IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PATRICIA K. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 98-CV-442-K (E)** ✓
	)	
UNITED STATES POSTAL SERVICE, sued as Marvin T. Runion, Post Master General,	)	**FILED**
	)	FEB 29 2000
	)	
Defendant.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

By Order, filed January 25, 2000, the Court gave Plaintiff twenty days in which to serve Defendant with a copy of the complaint or face dismissal of this case under Fed. R. Civ. P. 4(m). Plaintiff has failed to comply with Order.

IT IS THEREFORE ORDERED that the above-captioned case is DISMISSED WITHOUT PREJUDICE.

ORDERED this 29 **day of** February **, 2000.**

Terry C. Kern

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MATHEY-LELAND MANUFACTURING CO.,	)	ENTERED ON DOCKET
	)	FEB 29 2000
Plaintiff,	)	DATE
	)	
v.	)	**Case No. 99-CV-558-K (M)**
	)	**FILED**
H.G. KEY and H.O.S.S., INC.,	)	FEB 29 2000
	)	Phil Lombardi, Clerk
Defendants.	)	U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by Settlement Judge Molly McKay on February 24, 2000, that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED THIS 28 **DAY OF** February **, 2000.**

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONNA E. WICKER,
SSN: 441-40-8778,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 98-CV-797-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 28th day of Feb., 2000.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONNA E. WICKER,
SSN: 441-40-8778,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

DEFENDANT.

CASE NO. 98-CV-797-M

ORDER

Plaintiff, Donna E. Wicker, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

[1] Plaintiff's August 10, 1994 applications for disability insurance and supplemental security income benefits were denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held January 17, 1996. By decision dated January 23, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on November 4, 1998. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born September 28, 1941 and was 54 years old at the time of the hearing. [R. 27, 51, 55]. She claims to have been unable to work since June 7, 1993, due to back pain. [R. 51, 94].

The ALJ determined that Plaintiff has a severe impairment consisting of low back pain but that she retains the residual functional capacity (RFC) to perform a full range of sedentary work. [R.16]. He determined that Plaintiff's past relevant work (PRW) as collection clerk was not precluded by this RFC and found that Plaintiff was not disabled as defined by the Social Security Act. [R. 16]. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's decision is not supported by substantial evidence, specifically that the ALJ did not consider all of Plaintiff's impairments in assessing her

RFC and that he failed to perform a proper pain analysis pursuant to the regulations and case law. [Plaintiff's Brief]. For the reasons discussed below, the Court affirms the decision of the Commissioner.

Plaintiff contends the ALJ should have accepted the opinion of a radiologist who interpreted an April 22, 1994, X-ray of her lumbar spine. His report contains the following statement:

> POST L4 AND L5 LAMINECTOMY AND INTERNAL FIXATION, L4-S1, WITH EVIDENCE OF SOME LOOSENING OF THE RIGHT TRANSPEDICULAR SCREW, L4; NO FRACTURES OR SUBLUXATION OR OTHER ACUTE DISEASE PROCESS DETECTED. NERVE STIMULATOR IN PLACE.

[R. 149]. Plaintiff implies the radiologist's written impression from that report supports her claim of disabling pain. Contrary to Plaintiff's characterization however, this report does not contain an opinion of disability and does not conflict with the ALJ's ultimate conclusion that Plaintiff suffered some back pain but not to the extent alleged. Upon receiving this radiology report, Dr. Samuel Park, Plaintiff's treating neurologist, referred Plaintiff back to Dr. Randall Hendricks, the orthopedic surgeon who had performed the spinal surgery in June 1993. [R. 150]. Dr. Hendricks reviewed the X-ray film, examined Plaintiff and concluded that there was no evidence of screw failure. [R. 113]. On May 4, 1994, he reported:

> The examination did not show a hard neurologic deficit that was substantially increased over anything she has had in the past but she was having pain and for that reason I recommended tomograms to better evaluate the fusion.

Id. The ALJ was entitled to rely upon the findings of Plaintiff's treating physician. 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir.

1987)(the [Commissioner] must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record).

Basically, Plaintiff is dissatisfied with the weight given the evidence by the ALJ. Plaintiff essentially asks the Court to reweigh the evidence. This it cannot do. *Kelley v. Chater*, 62 F.3d 335, 337 (10th Cir. 1995). There is no evidence in the record that any of Plaintiff's treating physicians believed a screw failure had occurred. At any rate, even if the radiologist's report of a suspected screw loosening were given the preference Plaintiff wishes, there is no evidence that the radiologist whose impression it reflects, opined that such a screw loosening would render Plaintiff disabled for the performance of any gainful activities. While Plaintiff's treating physicians acknowledged Plaintiff experienced pain in the low back and required pain medication, there is no indication that any of them thought she would be unable to do **any** work. [R. 114, 118-119, 150]. In fact, Dr. Robin Dyer, also one of Plaintiff's treating physicians, reported on August 2, 1994 that Plaintiff's previous job involved a significant amount of lifting, "which she is now unable to do." He then stated:

> She is currently under the medical care of the Physical Rehabilitation Center of Tulsa, where she is continuing rehabilitation as stated above. Secondary to her slow progress and continued pain at this time, I feel Ms. Wicker is unable to work at a job which would require any heavy lifting of her.

[R. 119].

The Court finds there is no conflict between this evidence and the ALJ's conclusion that Plaintiff's pain limitation precluded any work requiring lifting over ten

pounds. The Court likewise finds no conflict between the evidence and the ALJ's determination that Plaintiff could perform a full range of sedentary work. Plaintiff has failed to prove that her impairments precluded her from performing her past relevant work as a collection clerk. See *Henrie v. United States Dep't of Health & Human Servs.*, 13 F.3d 359, 360 (10th Cir.1993) (recognizing claimant has burden of proof at step four).

Plaintiff claims the ALJ reached his conclusion that Plaintiff is not disabled by failing to consider all her impairments. The Court disagrees. The evidence relied upon by the ALJ as the basis for his decision is neither overwhelmed by other evidence nor mere conclusion. Review of the ALJ's decision reveals that he considered Plaintiff's allegations of headache and arthritis in the left hand and elbow and found the evidence did not support her claim of disability due to these conditions.

Review of the record supports the ALJ's conclusion in this regard. Headache was mentioned only three times in the medical record. Two of those complaints were symptoms associated with upper respiratory infections. [R. 134, 352]. The other was part of the past medical history recorded by Dr. Karen L. Boland, who was treating Plaintiff at the time for an ovarian cyst. [R. 155]. A March 7, 1995, note regarding Plaintiff's complaint of swelling and discomfort about the left medial elbow area reported normal range of motion of the elbow and no findings about the shoulder or wrist. [R. 285]. Osteophytes revealed by X-ray are reported on the note but there is no indication that any treatment other than applying ice and heat at that time was undertaken. Nor is there any indication by Plaintiff's examining or treating physicians that this problem recurred or required attention after that date.

It is well settled that subjective complaints alone are not sufficient to establish disability. *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir. 1993). A claimant bears the burden of demonstrating the existence of a medically severe impairment which significantly limits the abilities and aptitudes necessary to do most jobs. 20 C.F.R. §§ 404.1520(c), 404.1521(b). *Gossett v. Bowen*, 862 F.2d 802, 804 (10th Cir. 1988). Apart from Plaintiff's assertions that she is impaired by headache and left elbow problems, there is no evidence in the record to support such claims. The Commissioner is not obligated to accept as true, Plaintiff's subjective complaints that are not accompanied by medical evidence. *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir.1985). Such complaints may be disregarded if they are unsupported by clinical findings. *Maounis v. Heckler*, 738 F.2d 1032, 1034 (9th Cir.1984); *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986).

Plaintiff contends the ALJ failed to perform a proper pain analysis. The framework for the proper analysis of the evidence of allegedly disabling pain was set out in *Luna v. Bowen*, 834 F.2d 161 (10th Cir.1987). Plaintiff is correct in asserting that the ALJ was required to consider her subjective assertions concerning the severity of her pain. *Id.*; 20 C.F.R. 404.1529(c)(3); 20 C.F.R. 416.929(c)(3); Social Security Ruling 88-13. Indeed, the decision of the ALJ indicates that he did consider Plaintiff's subjective assertions. After consideration, he found Plaintiff's allegations of disabling pain not fully credible. The ALJ was entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility

determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990).

Contrary to Plaintiff's allegation, the ALJ did not ignore her complaints of pain, he found that Plaintiff significantly overstated her symptoms. The ALJ explained his reasons for discounting Plaintiff's allegations of pain so severe that she is unable to engage in any substantial gainful activity. He discussed the objective medical evidence, including the reports and records of Plaintiff's treating physicians, Plaintiff's daily activities which included light cooking, doing laundry and driving, her testimony that she could lift 10 pounds and her demeanor at the hearing. [R. 15]. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain and properly linked his credibility findings to the record, in accordance with the correct legal standards established by the Commissioner and the courts.

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his determination that Plaintiff retained the capacity to perform her past relevant sedentary work. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 28th day of Feb., 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99CV1053BU(E)
	)	
BRIAN KINNEY,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 25th day of February, 2000, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Brian Kinney, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Brian Kinney, was served with Summons and Complaint on January 19, 2000. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Brian Kinney, for the principal amount of $4,306.85, plus accrued

interest of $1,776.03, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.287 percent per annum until paid, plus costs of this action.

Michael Burrage
United States District Judge

Submitted By:

Phil Pinnell

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/llf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TINA M. MARTIN,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

Case No. 98-CV-963-E (M)

ORDER

On January 25, 1999, this Court reversed and remanded this case to the Commissioner for further proceedings. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of $2,011.25 for attorney fees and no costs, for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney and paralegal fees in the amount of $2,011.25 and no costs under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff

counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 28th day of February 2000.

JAMES O. ELLISON
United States District Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KILM W. ADKINS,

Petitioner,

vs.

M. E. RAY, Warden; and the ATTORNEY GENERAL OF OKLAHOMA,

Respondents.

No. 99-CV-468-C (M)

ORDER

On June 17, 1999, Petitioner, a prisoner incarcerated at the Federal Correctional Institution located in Edgefield, South Carolina,[1] filed a motion for leave to proceed *in forma pauperis* and a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner, appearing *pro se*, challenges the constitutionality of his sentence, entered in the United States District Court for the Western District of Missouri, Case No. 91-018-01-CR-W-9. After being denied leave to proceed *in forma pauperis*, Petitioner paid the $5.00 filing fee required to commence this action. Currently pending before the Court are the motion to dismiss (#10), filed by the Attorney General of Oklahoma; Petitioner's motion for summary judgment (#11); and Petitioner's "motion to transfer to the United States District Court for the District of South Carolina under Title 28 U.S.C. § 2241(d)" (#6).

As an initial matter, it has come to the Court's attention that the August 16, 1999 Order (#5) sent to the Oklahoma Attorney General and directing Respondent to respond to the allegations of the petition, inadvertently states that this action is proceeding pursuant to 28 U.S.C. § 2254.

[1]During the pendency of this action, Petitioner has been transferred to the Federal Correctional Institution located in Butner, North Carolina.

Because Petitioner is a federal prisoner and has indicated in his papers that he brings this action pursuant to § 2241, the Court finds that the August 16, 1999 Order should be amended *nunc pro tunc* to indicate that this action was filed as a 28 U.S.C. § 2241 petition for writ of habeas corpus.

A. Pending Motions

1. Motion to Dismiss Attorney General of Oklahoma as a Party Respondent

In his § 2241 petition, Petitioner challenges his sentence on two (2) grounds: (1) "that Petitioner's federal sentence was improperly enhanced by his prior Oklahoma convictions that were obtained against him as a result of invalidity of juvenile certification," and (2) "that Petitioner's federal sentence was improperly enhanced by prior Oklahoma convictions that were obtained against him as a result of procedural invalidity of his guilty pleas." (#1 at 4). On October 6, 1999, after receiving an extension of time to respond as directed by the Court's August 16, 1999 Order, the Attorney General of Oklahoma entered a Special Appearance (#9) and requested to be dismissed (#10) on the basis that he is not a proper party to this § 2241 action. Petitioner is not presently in custody pursuant to a judgment entered by the State of Oklahoma nor does he indicate that he may be subject to such custody in the future. Because Petitioner challenges his federal sentence entered in the United States District Court for the Western District of Missouri, the Court agrees that the Oklahoma Attorney General is not a proper party to this action. Therefore, the motion to dismiss the Attorney General of Oklahoma as a party respondent should be granted and the Attorney General of Oklahoma is released from further participation in this action.

2. Petitioner's Motion for Summary Judgment

In his motion for summary judgment, filed on October 7, 1999, Petitioner asserts that "since

the respondent did not respond to the issues in petitioner's habeas corpus, petitioner is entitled to judgement as a matter of law." However, the Court disagrees. As stated above, upon service of the petition and in response to the Court's August 16, 1999 Order to show cause why the writ should not issue, the Oklahoma Attorney General entered a Special Appearance and moved to be dismissed from this action. As a result, no further response by the Oklahoma Attorney General was required pending resolution of his motion to dismiss. Furthermore, the other named respondent, M. E. Ray, Warden of the facility where Petitioner was incarcerated at the time he filed his petition, has not been ordered to respond to the allegations raised in Petitioner's § 2241 petition. As a result, Petitioner is not entitled to summary judgment and his motion should be denied.

3. Petitioner's Motion to Transfer

In his motion to transfer this action to the United States District Court for the District of South Carolina, Petitioner cites 28 U.S.C. § 2241(d) as authority for his request. However, § 2241(d) authorizes transfer of cases where the application for writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts. Because Petitioner is in federal custody and is not in custody pursuant to the judgment and sentence of a State court, § 2241(d) has no application to this case. For that reason, the Court finds that Petitioner's motion to transfer this action to the United States District Court for the District of South Carolina should be denied.

B. Improper Venue

Having disposed of the pending motions, the Court must determine whether Petitioner properly filed this § 2241 petition for habeas corpus relief in this District Court. In his petition,

Petitioner states that he was convicted in the United States District Court for the Western District of Missouri, Case No. 91-018-01-CR-W-9, on his plea of guilty to Count I, Conspiracy to Distribute Cocaine Base, in violation of 21 U.S.C. § 846. On July 31, 1991, he was sentenced to 354 months imprisonment after it was determined that he was a career offender under § 4B1.1 of the United States Sentencing Guidelines. According to Petitioner, his federal sentence was improperly enhanced with an invalid 1975 robbery conviction entered in the District Court for Washington County, State of Oklahoma. Petitioner further states that the Eighth Circuit Court of Appeals affirmed his conviction and sentence in 1993 and that the Western District of Missouri denied post-conviction relief in 1996.

Section 2241 is intended to provide a remedy for challenges to the execution of a sentence while § 2255 provides the "exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective." Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996). It is clear that in the instant case, Petitioner's claims challenge the validity of his sentence. Therefore, Petitioner's exclusive remedy is provided by § 2255, unless he can show that § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255.

However, regardless of whether Petitioner can show that § 2255 is inadequate or ineffective to test the legality of his detention, the Court finds that this petition should be dismissed because venue does not lie in this judicial district. See 28 U.S.C. § 1406(a). If § 2255 provides Petitioner's exclusive remedy, then Petitioner must file his § 2255 motion in the United States District Court for the Western District of Missouri, the court which imposed his sentence. See 28 U.S.C. § 2255; Rule 1, *Rules Governing Section 2255 Proceedings for the United States District Courts*. Should Petitioner be able to demonstrate that the remedy provided by § 2255 is inadequate or ineffective to test the legality of his detention, then it is possible that he could be allowed to pursue his claims

under § 2241. A § 2241 petition challenging the execution of a sentence is filed in the district court where the petitioner is incarcerated. See 28 U.S.C. § 2241; Bradshaw, 86 F.3d at 166 ("petition under 28 U.S.C. § 2241 . . . must be filed in the district where the prisoner is confined"). However, in certain cases the district court where the petitioner is incarcerated may transfer the petition to a more convenient or appropriate forum. Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 500 (1973). For example, in cases involving claims of actual innocence where the petitioner has been procedurally barred from seeking relief through a successive § 2255 motion and the court allows the claim to be heard under § 2241, courts have transferred the § 2241 petition to the court where the petitioner was convicted and sentenced. See, e.g., Lee v. Wetzel, 49 F. Supp.2d 875 (E.D. La. 1999); Alamin v. Gerlinski, 30 F. Supp.2d 464 (M.D. Pa. 1998); Conley v. Crabtree, 14 F. Supp.2d 1203 (D. Or. 1998). In the instant case, Petitioner is neither incarcerated in this judicial district nor was he convicted and sentenced in this Court.[2] Therefore, even if Petitioner were allowed to proceed under § 2241, venue does not lie in this judicial district and his petition should be dismissed. See 28 U.S.C. § 1406(a).

[2]Although venue would lie in this judicial district to consider a § 2254 direct challenge to Petitioner's fully expired state conviction(s) entered in the District Court of Washington County, State of Oklahoma, such a challenge would nonetheless be dismissed under Gamble v. Parsons, 898 F.2d 117, 118 (10th Cir. 1990) (holding that a fully-expired conviction may not be attacked directly in a habeas action).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) The Court's August 16, 1999 Order (#5) is amended *nunc pro tunc* to indicate that this action was filed as a 28 U.S.C. § 2241 petition for writ of habeas corpus.

(2) Petitioner's "motion to transfer to the United States District Court, District of South Carolina, under Title 28 U.S.C. § 2241(d)" (#6) is **denied**.

(3) The motion to dismiss the Attorney General of Oklahoma as a party respondent (#10) is **granted**.

(4) Petitioner's motion for summary judgment (#11) is **denied**.

(5) The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **dismissed without prejudice** based on improper venue.

(6) This is a final order terminating this action.

SO ORDERED THIS 28th day of February, 2000.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 29 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

JOHNNY E. REEVE aka Johnny Reeve;
KELLEY A. REEVE;
FIRST NATIONAL BANK OF BOSTON;
COUNTY TREASURER, Creek County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE FEB 29 2000

CIVIL ACTION NO. 99-CV-0451-B (J)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29th day of Feb., 2000. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, appear by Michael S. Loeffler, Assistant District Attorney, Creek County, Oklahoma; and Defendants, Johnny E. Reeve aka Johnny Reeve, Kelley A. Reeve, and First National Bank of Boston, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Johnny E. Reeve aka Johnny Reeve, was served with Summons and Complaint by a United States Deputy Marshal on September 10, 1999; that the Defendant, Kelley A. Reeve, was served with Summons and

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Complaint by certified mail, return receipt requested, delivery restricted to addressee, on July 29, 1999; that the Defendant, First National Bank of Boston, executed a Waiver of Service of Summons on or before July 27, 1999.

It appears that the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, filed their Answers on August 10, 1999 and December 15, 1999; and that the Defendants, Johnny E. Reeve aka Johnny Reeve, Kelley A. Reeve, and First National Bank of Boston, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Fifteen (15) in Block Four (4), SUSIE Q 2ND ADDITION to the city of Sapulpa, Creek County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on May 13, 1991, Johnny E. Reeve and Kelley A. Reeve executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, their mortgage note in the amount of $45,000.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Johnny E. Reeve and Kelley A. Reeve, husband and wife, executed and delivered to the United States of America, acting on behalf of the Secretary of

Veterans Affairs, a real estate mortgage dated May 13, 1991, covering the above-described property, situated in the State of Oklahoma, Creek County. This mortgage was recorded on May 14, 1991, in Book 276, Page 1797, in the records of Creek County, Oklahoma.

The Court further finds that the Defendants, Johnny E. Reeve aka Johnny Reeve and Kelley A. Reeve, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Johnny E. Reeve aka Johnny Reeve and Kelley A. Reeve, are indebted to the Plaintiff in the principal sum of $41,763.80, plus administrative charges in the amount of $145.00, plus penalty charges in the amount of $34.64, plus accrued interest in the amount of $3,597.30 as of September 8, 1998, plus interest accruing thereafter at the rate of 7.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $59.30 ($49.30 fees for service of Summons and Complaint, $10.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Creek County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $1,342.12, plus penalties and interest. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Creek County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Johnny E. Reeve aka Johnny Reeve, Kelley A. Reeve, and First National Bank of Boston, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against Defendants, Johnny E. Reeve aka Johnny Reeve and Kelley A. Reeve, in the principal sum of $41,763.80, plus administrative charges in the amount of $145.00, plus penalty charges in the amount of $34.64, plus accrued interest in the amount of $3,597.30 as of September 8, 1998, plus interest accruing thereafter at the rate of 7.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 6.287 percent per annum until paid, plus the costs of this action in the amount of $59.30 ($49.30 fees for service of Summons and Complaint, $10.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Creek County, Oklahoma, have and recover judgment in the amount of $1,342.12, plus penalties and interest, for ad valorem taxes, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Johnny E. Reeve aka Johnny Reeve, Kelley A. Reeve, First National

Bank of Boston, and Board of County Commissioners, Creek County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Johnny E. Reeve aka Johnny Reeve and Kelley A. Reeve, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Creek County, Oklahoma;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this

judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

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Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Creek County, Oklahoma

Judgment of Foreclosure
Case No. 99-CV-0451-B (J) (Reeve)

WDB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOLENE SMITH and JAN PRAWDZIK,	)	
Plaintiffs,	)	
vs.	)	**Case No. 98-CV-0843 H (J)**
MORRISON KNUDSEN CORP., and SECOR INTERNATIONAL, INCORPORATED,	)	
Defendants.	)	

ORDER

This matter comes before the Court on two motions for summary judgment by Defendant SECOR International, Incorporated ("Defendant SECOR").

Plaintiff Jolene Smith ("Plaintiff Smith"), has alleged that Defendant SECOR wrongfully terminated her employment with the company based on her gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et. seq. ("Title VII").

Plaintiff Jan Prawdzik ("Plaintiff Prawdzik"), alleged that Defendant SECOR wrongfully terminated his employment in retaliation for his participation in Plaintiff Smith's discrimination claim against Defendant SECOR, in violation of Title VII. After the submission of briefs by both parties, on February 8, 2000, the Court held a hearing with respect to Defendant SECOR's motions. The Court finds that after considering the admissible evidence in the record, Defendant SECOR is entitled to summary judgment on Plaintiff Smith's gender discrimination claim and Plaintiff Prawdzik's retaliation claim.

I. DISCUSSION

A. Summary Judgment Standard

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In Celotex, the United States Supreme Court stated:

> [t]he plain language of Rule 56(c) *mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. (Emphasis added.) 477 U.S. at 322.

To survive a motion for summary judgment, Plaintiff "must establish that there is a genuine issue of material fact." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). Plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." Id. at 586. "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Plaintiff may not rely on mere allegations or denials in his pleadings, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. The party opposing a properly supported motion for summary judgment must offer evidence in admissible form of specific facts sufficient to raise *a genuine issue of material fact.* Rule 56(e), Fed.R.Civ.P., Anderson, supra. The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex. Setliff v. Memorial Hosp., 850 F.2d 1384, 1393 (10th Cir. 1988).

B. Plaintiff Smith's Claim Of Gender Discrimination

In order for Plaintiff Smith to survive summary judgment on her claim that she was discharged because of her gender, she must first establish a prima facie case of gender discrimination. Plaintiff Smith must offer evidence to show (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position at issue; and (4) she was treated less favorably than others not in the protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Sanchez v. Denver Public Schools, 164 F.3d 527 (10th Cir. 1998). If she establishes a prima facie case, the burden shifts to Defendant SECOR to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. Id. If Defendant SECOR does so, the burden returns to Plaintiff Smith to show that Defendant SECOR's proffered reason was merely a pretext for discrimination. Id.

In the instant case, Plaintiff Smith has not established a prima facie case of gender discrimination because she cannot establish that she was treated less favorably than male employees. In her Response and at oral argument, Plaintiff Smith compared accidents involving male employees of Defendant SECOR on the Tar Creek Project with her own unauthorized conduct in an effort to show that she was treated more harshly than men by Defendant SECOR. However, the incidents involving men that are referred to in the record are not remotely comparable to her conduct of intentionally operating equipment without certification or authorization. Plaintiff Smith's attempt to compare incidents which are factually dissimilar cannot defeat summary judgment. See McKnight v. Kimberly Clark Corp., 149 F.3d 1125 (10th Cir. 1998) (summary judgment granted based on failure of plaintiff to establish that gender influenced employment decisions); EEOC v. Flasher, 986 F.2d 1312 (10th Cir. 1992). Accordingly, Plaintiff Smith's inability to establish that

Even if the Court disagrees with Defendant SECOR's decision to discharge Plaintiff Smith, summary judgment is still appropriate. As explained by the Tenth Circuit in Sanchez v. Phillip Morris, Inc., 992 F.2d 244, 247 (10th Cir. 1993), "Title VII is not violated by the exercise of erroneous or even illogical business judgment." The inquiry is not whether Defendant SECOR's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith based upon such beliefs. Bullington v. United Air Lines, 186 F.3d 1301 (10th Cir. 1999). In this case, Plaintiff Smith produced no evidence to create a genuine issue of material fact as to whether Defendant SECOR's decision to discharge her for her unauthorized operation of the skid loader was a pretext for intentional gender discrimination.

The failure of Plaintiff Smith to establish her prima facie case of gender discrimination confirms that Defendant SECOR is entitled to summary judgment on her claim.

C. Plaintiff Prawdzik's Claim Of Retaliation Under Title VII

In the absence of direct evidence of retaliation, Plaintiff Prawdzik must first establish a prima facie case of retaliation. Morgan v. Hilti, Inc., 108 F.3d 1319 (10th Cir. 1997); Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996); Cole v. Ruidoso Municipal Schools, 43 F.3d 1373 (10th Cir. 1994). The Tenth Circuit applies the burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to retaliation claims. Trujillo v. New Mexico Dept. of Corrections, 1999 WL 194151 (10th Cir. 1999). According to the Tenth Circuit, Plaintiff Prawdzik must establish that he (1) engaged in protected activity (either engaged in opposition to Title VII discrimination or participated in a Title VII proceeding); (2) he was thereafter subject to adverse employment action; and (3) that a causal connection existed between his protected activity and the adverse employment action. Id. In other words, Plaintiff Prawdzik must present some evidence that

Defendant SECOR undertook the adverse employment action for the purpose of retaliation. Bullington v. United Airlines, Inc., 186 F.3d 1301 (10th Cir. 1999).

Once Plaintiff Prawdzik establishes a prima facie case, the burden shifts to Defendant SECOR to establish that it had a legitimate, non-retaliatory reason for its employment decision. Id. If Defendant SECOR presents a non-retaliatory reason, the burden shifts back to Plaintiff Prawdzik to establish that there is a genuine issue of material fact as to whether the employer's proffered reason is a pretext for retaliation. Id.

In this case, Plaintiff Prawdzik has not presented sufficient evidence to establish a prima facie case of retaliation. Plaintiff Prawdzik contends that the protected activity in which he engaged consisted of assisting Plaintiff Smith in her charge of discrimination with the EEOC and being listed as a witness in that proceeding.

Irrespective of Plaintiff Prawdzik's personal beliefs about his termination, there is no evidence that his supervisor Larry Haser ("Haser"), or any member of Defendant SECOR's management knew that Plaintiff Smith had filed a charge of discrimination with the OHRC/EEOC at the time Plaintiff Prawdzik was discharged. In fact, Plaintiff Smith's charge of discrimination was not even signed by her until February 13, 1998 – nearly four (4) months after Plaintiff Prawdzik's discharge in October, 1997. The fact that Plaintiff Prawdzik was discharged before Plaintiff Smith filed her Charge of Discrimination with the OHRC/EEOC confirms, as a matter of law, that there was no protected activity which could be the subject of a retaliation claim.

Although the Court concludes that Plaintiff Prawdzik failed to establish a prima facie case of retaliation, there is also no evidence presented to suggest that Defendant SECOR's reason for discharging him was a pretext for retaliation. In deciding whether Defendant SECOR met its burden

of production, this Court "need not decide that the [employer's] proffered reason[s] . . . [are] credible or sufficient. The employer's burden is simply to demonstrate a legitimate, nondiscriminatory reason for its action." Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 530 (10th Cir. 1994). "Plaintiff's mere conjecture that their employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of . . . judgment." Branson v. Price River Coal Co., 853 F.2d 768, 771-72 (10th Cir. 1988) (internal quotations and citations omitted).

There is undisputed evidence in the record that Defendant SECOR issued several written warnings to Plaintiff Prawdzik about his performance as Superintendent at the Tar Creek site. In fact, members of Morrison Knudsen Corp.'s management also expressed concern over Plaintiff Prawdzik's performance as Superintendent. The documentary evidence in this case clearly supports Defendant SECOR's decision to terminate Plaintiff Prawdzik's employment. The undisputed evidence in the record in addition to Plaintiff Prawdzik's failure to present any credible evidence confirms that Defendant SECOR is entitled to summary judgment on Plaintiff Prawdzik's retaliation claim.

II. CONCLUSION

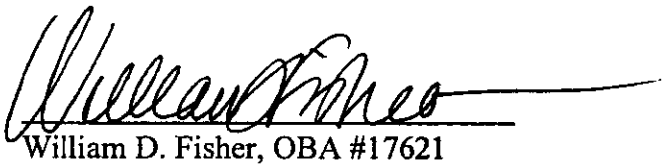
Neither Plaintiff Smith nor Plaintiff Prawdzik presented evidence to establish their prima facie cases under Title VII. For the reasons stated above, the Court grants Defendant SECOR's motion for summary judgment on Plaintiff Smith's gender discrimination claim and also grants Defendant SECOR's motion for summary judgment on Plaintiff Prawdzik's claim of retaliation.

IT IS SO ORDERED dated this 25th day of February, 2000.

/s/ SVEN ERIK HOLMES

Sven Erik Holmes
United States District Judge

Approved as to form:



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ATTORNEY FOR PLAINTIFFS
JOLENE SMITH AND JAN PRAWDZIK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUSAN MAYTUBBY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99-CV-0331-H(J)
	)	
LIDS CORPORATION, a corporation,	)	
	)	
Defendant.	)	

JOINT STIPULATION OF DISMISSAL

COME NOW the parties, Plaintiff Susan Maytubby and Defendant Lids Corporation, by and through their respective attorneys, and advise the Court that they have reached a mutually satisfactory settlement regarding Plaintiff's claims herein. Therefore, the parties stipulate that this action should be dismissed with prejudice with each of the parties to bear their own costs and attorneys' fees.

Dated this 25th day of February, 2000.

Respectfully submitted,

WILKERSON, WASSALL & WARMAN

By: _____

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ATTORNEYS FOR DEFENDANT
LIDS CORPORATION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

1. ESTATE OF BALTAZAR C. HUERTA, Deceased, by and through its Co-Personal Representatives, ELIZAR ELOY HUERTA, HERON ROBERTO HUERTA, IDA BILBY, and RICHARD HUERTA,	)	
Plaintiff,	)	
v.	)	**Case No. 00CV0023H (J)**
1. CATOOSA HEALTH CARE CENTER, INC., an Oklahoma corporation, d/b/a ROLLING HILLS CARE CENTER; 2. BRISTOL NURSING AND REHAB CENTER OF TULSA, INC., an Oklahoma corporation; 3. GEORGIAN COURT NURSING CENTER, L.L.C., an Oklahoma limited liability company; 4. SELECT SPECIALTY HOSPITAL-TULSA, INC., formerly known as AMERICAN TRANSITIONAL HOSPITALS OF OKLAHOMA, INC.-TULSA, an Oklahoma corporation,	)	
Defendants.	)	

ORDER OF DISMISSAL WITHOUT PREJUDICE

Now on this 25TH day of FEBRUARY, 2000, the above entitled cause comes on for consideration upon the Stipulation of Dismissal Without Prejudice filed in this matter. The Court, after a review of the Stipulation and file documents finds that said Stipulation of Dismissal Without Prejudice should be and the same is hereby granted and the above entitled cause is hereby dismissed without prejudice to re-filing of same.

UNITED STATES DISTRICT COURT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOE KIGHT,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

ENTERED ON DOCKET
DATE FEB 28 2000

Case No. 98-CV-751-H(M)

FILED
FEB 25 2000
U.S. DISTRICT COURT

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket # 14).

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation. The decision of the Commissioner of the Social Security Administration is hereby REVERSED and REMANDED for additional proceedings consistent with the Report and Recommendation.

IT IS SO ORDERED.

This 25th day of February, 2000.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOLENE SMITH, and JAN PRAWDZIK Plaintiffs, v. MORRISON KNUDSEN CORP., an Ohio Corporation, and SECOR INTERNATIONAL, INCORPORATED, a Delaware Corporation, Defendants.	)	ENTERED ON DOCKET DATE FEB 28 2000 Case No. 98-CV-0843 H (J)

ORDER

This matter comes before the Court on Defendant Morrison Knudsen Corporation's ("MK") Motion for Summary Judgment. For the reasons set forth below, the Court concludes that MK's Motion for Summary Judgment should be granted in all respects.

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Libberty Lobby, Inc., 477 U.S. 242, 247-48

(1986). Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86. The nonmoving party must present evidence sufficient to allow a jury to return a verdict for that party. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 250.

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

II.

A. Plaintiff Jolene Smith's Claims Arising Under Title VII

Ms. Smith alleges MK violated Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000(e) ("Title VII"), by requiring her immediate employer, Secor, to terminate her employment based upon her sex. Although Ms. Smith admits she was never employed by MK, she claims MK exercised sufficient control over her employment with Secor that it should be held to be her employer for Title VII purposes.

In determining whether a company is an individual's employer for Title VII purposes in the absence of a direct employment relationship, the Tenth Circuit Court of Appeals has recognized that different courts have applied different formulations or tests over the years. See Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998). Noting that a broad interpretation should be given to the employer/employee provisions of Title VII to effect its remedial purposes,

the Court has designated the single employer test as the applicable test to be used in the Tenth Circuit. Id. Under the single employer test, courts consider the following four factors: interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control. The key factor of this four-part test is whether the putative employer has centralized control of labor relations. Id.

The evidence fails to show that MK exercised control over the labor relations of Secor. Ms. Smith does not dispute that she was hired solely by Secor without any input or consultation from MK, or that her wages were paid exclusively by Secor. Ms. Smith also concedes that it was Secor supervisors who primarily controlled her day-to-day activities while at work. Further, Ms. Smith has not offered any evidence of common management between Secor and MK nor has she offered any evidence of common ownership or financial control between the two companies.

Even when the facts and evidence are viewed in the light most favorable to the plaintiff, it is the Court's determination that Ms. Smith has failed to satisfy the single employer test as set forth in Lockard. Therefore, the Court finds that MK was not Ms. Smith's employer for Title VII purposes and summary judgment is granted to MK on Ms. Smith's claims against it pursuant to Title VII.

B. Ms. Smith's Claim Against MK For Tortious Interference With Contractual Relations

Ms. Smith alleges that MK tortiously interfered with her employment with Secor by requesting that Secor remove her from the Tar Creek job site. Even assuming, for purposes of summary judgment, that MK requested that Secor remove Ms. Smith from the job site, it is undisputed that MK had a contractual right to do so pursuant to its subcontracting agreement with Secor. The agreement provides that Secor "agrees to replace any employee that MK, at its sole discretion, determines to be unacceptable for reasons of personal safety or for any other just

cause." MK - Secor Service Agreement, page 22, paragraph no. 2, Appendix to MK's Motion for Summary Judgment, Tab D.

A necessary element of Ms. Smith's claim for tortious interference with contractual relations is that the interference must be neither justified, privileged nor excusable. Mac Adjustment, Inc. v. Property Loss Research Bureau, 595 P.2d 427 (Okla. 1979). A defendant is permitted to interfere with another's contractual relations to protect his own present existing economic interest, such as "where a manufacturer or corporate affiliate induces a dealer or subsidiary to terminate an employee or agent." W. Page Keeton et al., Prosser and Keeton on the Law of Torts, p. 986 (5th ed. 1984). There is no dispute that MK had contractual and statutory obligations to maintain a safe workplace. Accordingly, MK had an economic interest in removing any individual it considered to be unsafe from the job site. Further, the Oklahoma Supreme Court has held that when a company has a contractual right to request an individual's removal from the job, and the company exercises that right, the company's action is privileged and the individual cannot establish a claim for tortious interference. Paul Hardeman, Inc. v. Bradley, 486 P.2d 731 (Okla. 1971). The Court's decision in Hardeman is directly applicable to Ms. Smith's claim for tortious interference and, therefore, summary judgment is granted to MK on that claim.

C. Mr. Prawdzik's Claim For Tortious Interference With Contractual Relations.

Mr. Prawdzik alleges that MK tortiously interfered with his contractual relations with Secor by requesting or causing Secor to terminate his employment. The essence of Mr. Prawdzik's claim is that MK made complaints to Secor regarding Mr. Prawdzik's performance which, according to Mr. Prawdzik, were unfounded and that as a result of those claims, he was discharged.

Even assuming, for purposes of summary judgment, that MK made such complaints and that the complaints were unfounded and they led to his discharge, Mr. Prawdzik has failed to offer any evidence which could reasonably establish that MK's actions were malicious and wrongful. Mac Adjustment, Inc. v. Property Loss Research Bureau, 595 P.2d 427 (Okla. 1979). Mr. Prawdzik bases his claim solely on the grounds that he believes MK's complaints were unfounded. In order to prevail, however, he must show not only that the complaints were unfounded, but also that MK's actions were malicious. As there is no evidence to support an issue of fact on this question, the Court finds that MK's Motion for Summary Judgment as to Mr. Prawdzik's claim for tortious interference with contractual relations shall be granted.

For the reasons expressed herein, Defendant MK's Motion for Summary Judgment is hereby granted in its entirety.

IT IS SO ORDERED.

This 25TH day of February, 2000.

Sven Erik Holmes
United States District Judge

Approved as to form:

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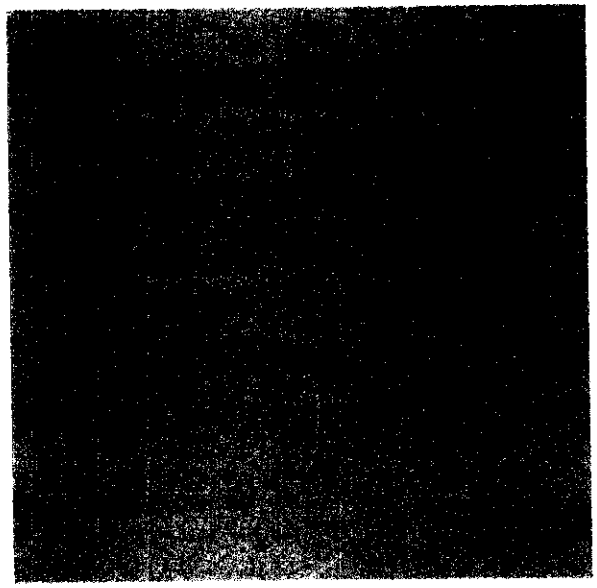
THE J.R. HUBER FIRM, P.C.



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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WANDA N. MINER,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

No. 99-CV-783-M

FILED

FEB 25 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE FEB 28 2000

ADMINISTRATIVE CLOSING ORDER

This case was remanded to the Commissioner of Social Security under sentence six of 42 U.S.C. §405(g). In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 25th day of Feb., 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WANDA N. MINER,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 99-CV-783-M

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this 25th day of February 2000.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

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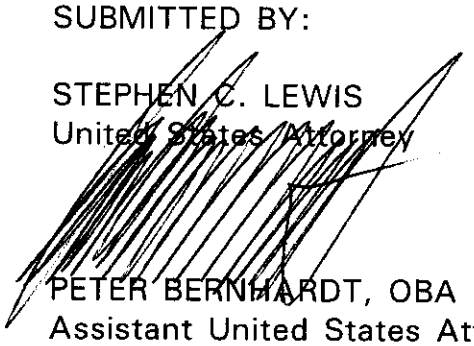
SUBMITTED BY:



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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLIFFORD E. MAY,
SSN: 465-58-3724,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-0525-EA

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the plaintiff and against the defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 25th day of February, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLIFFORD E. MAY, **SSN: 465-58-3724,**	)	
Plaintiff,	)	
v.	)	**Case No. 97-CV-0525-EA**
KENNETH S. APFEL, Commissioner, **Social Security Administration,**	)	
Defendant.	)	

ORDER

Claimant, Clifford E. May, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act. In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES AND REMANDS** for further proceedings consistent with this opinion.

Social Security Law and Standard of Review

Disability under the Social Security Act is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any

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other kind of substantial gainful work in the national economy . . . ." Id. § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. §§ 404.1520, 416.920.[1]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence

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[1] Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See id. §§ 404.1521, 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments "medically equivalent" to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant's step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account his age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

Claimant's Background

Claimant was born on September 18, 1941, and was 54 years old as at the time of the ALJ's decision. He has high school education with a GED. Claimant has worked in various managerial and sales positions at a hardware store, gas company, convenience store, and discount store. Claimant alleges an inability to work beginning February 21, 1994, when he was lifting riding lawn mowers as part of his job at Wal-Mart. He had back surgery on May 18, 1994. Five months later he returned to work at Wal-Mart for 3-4 hours per day walking the floors and offering assistance to customers who could not find certain products. He also continued working at Wal-Mart on a part-time basis after March 1, 1995, when he had a second surgery to remove the hardware placed in his back in the first surgery. He claims that he is disabled due to a back injury, residuals of back surgery, and pain. He initially claimed that he was also disabled by diabetes mellitis.

Procedural History

On January 9, 1995, claimant protectively applied for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application for benefits was denied in its entirety initially, and on reconsideration. A hearing before Administrative Law Judge James D. Jordan (ALJ) was held March 28, 1996, in Tulsa, Oklahoma. By decision dated May 8, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On April 4, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.981.

Decision of the Administrative Law Judge

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had lumbar disc disease, status post laminectomy, fusion, and rod removal, diabetes mellitus, and obesity, impairments which cause significant vocationally relevant limitations but failed to meet or equal the criteria for listed impairments described in 20 C.F.R., Part 404, Subpart P, Appendix 1 (the "Listings"). The ALJ determined that claimant had the residual functional capacity (RFC) to perform a full range of light work "diminished by his inability to occasionally stoop and crawl" (R. 19), and his need to alternate sitting and standing at will. The ALJ found that claimant could not perform his past relevant work, but could make an adjustment to other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant asserts as error that the ALJ (1) failed to find that claimant meets Listing 1.05C; (2) ignored the opinion of the treating physician and rating physician; (3) failed to consider the impact of all claimant's impairments and failed to include those impairments in his hypothetical question to the vocational expert; (4) failed to perform a proper pain and credibility analysis; (5) failed to find that the evidence of non-disability is outweighed by substantial evidence of disability.

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listing of Impairments (20 C.F.R. Pt. 404, Subpt. P, App. 1). If claimant has an impairment, or a combination of impairments, which meets or equals an impairment in the Listing of Impairments, claimant is presumed disabled without considering his age, education, and work experience. 20

C.F.R. §§ 404.1511(a); 404.1520(d). Equivalence is determined "on medical evidence only." Id. § 404.1526(b). A claimant has the burden of proving that a Listing has been equaled or met. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988). Yet, the ALJ is "required to discuss the evidence and explain why he found that [claimant] was not disabled at step three." Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996).

The ALJ did not analyze claimant's impairments by reference to Listing 1.05C, which provides:

> C. Other vertebrogenic[2] disorders (e.g., herniated nucleus puplosus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:
> 1. Pain, muscle spasm, and significant limitation of motion in the spine; and
> 2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.05C (footnote added). The ALJ stated that "[n]o treating or examining physician has mentioned findings equivalent in severity to the criteria of any listed impairment." (R. 13) However, claimant points out that his treating and examining physicians did mention symptoms, signs and laboratory findings which could lead to a conclusion that claimant meets Listing 1.05C, if he indeed has a vertebrogenic disorder. Claimant specifically refers to various reports by James A. Rodgers, M.D., claimant's treating physician (R. 156, 194, 245, 249-50), and Griffith C. Miller, M.D., who examined claimant and rated him as having 75% total permanent partial disability (R. 201-02).

The first report to which claimant refers is dated January 9, 1995. In it, Dr. Rodgers notes that claimant complained of having pain and muscle spasms, but, on examination, straight leg raising

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[2] "[A]rising in a vertebra or in the vertebral column." Dorland's Illustrated Medical Dictionary 1819 (28th ed. 1994).

by claimant caused "very little pain," his legs seemed strong and his reflexes seemed symmetrical at the knees and ankles. (R. 156) Dr. Rodgers' recommendations indicate that claimant would "continue to try to lose weight, do his exercises, and continue to try to be tough." (Id.) Claimant's rehabilitation nurse was to continue working with claimant's employer to find other positions that claimant could perform. Dr. Rodgers also suggested that "seeking Social Security benefits may be his long-term best option." (R. 157) Dr. Rodgers' remarks do not indicate that claimant could perform no work at all or that Dr. Rodgers was knowledgeable about the criteria for claimant to be adjudged disabled under the Social Security Act.

The second report to which claimant refers is dated April 24, 1995. Dr. Rodgers noted that claimant was back at work, and "[t]here is no question he feels better than he did before removal of the instrumentation." (R. 194) He noted that claimant still complained of some back pain, for which he took his medication, and claimant reported that he was trying to lose weight and do his exercises. The physical examination indicated that straight leg raising was "better tolerated today, but still with back at 90° hip flexion. His legs seem strong. His reflexes are symmetrical at the knees at 2/4, with the left ankle jerk slightly down compared with the right." (Id.) Dr. Rodgers' impression was that claimant was doing well and had a solid fusion. He recommended that claimant increase his work hours and continue taking his medications. He remarked that he would give claimant a rating according to AMA guidelines when claimant returned to see him in two months. (Id.)

When Dr. Rodgers saw claimant in June 1995, claimant complained of pain in his left hip and left leg, and numbness in his left foot when he sat too long. (R. 245) Straight leg raising caused left hip pain at 90° but very little right hip pain. Claimant had weakness in his left ankle dorsiflexor compared with his right, and the left ankle jerk was still down compared with the right ankle, but his

reflexes were symmetrical at the knee. Dr. Rodgers opined that claimant's problems might have been "related to the L4-5 level above his fusion or it may be related to a pseudoarthrosis,[3] unrecognized at that time of removal of instrumentation." (Id.) He recommended that claimant "become temporarily totally disabled" and have a lumbar myelogram and post-myelogram CT scan performed. (Id.)

When claimant returned a few days later, after the myelogram and CT scan, Dr. Rodgers found no stenosis or disc herniation. (R. 247) He saw post-surgical changes at L5-S1, and he saw a model posterolateral fusion mass at L5-S1. He recommended that additional x-rays be taken and he surmised that, if standing flexion/extension views indicated that claimant did not have motion at L5-S1, it could be that "this is the best we can do and that some of his complaints and deficits, will be more permanent." (Id.)

The last time Dr. Rodgers saw claimant, on July 10, 1995, he reviewed the x-rays of claimant's back, and saw "no continued nerve root compression, or disc herniation at L3-4 or at L4-5 above his L5-S1 fusion." (R. 249) He saw no motion between L5-S1 but some motion at the levels above. Nonetheless, straight leg raising on the left side caused left hip and posterior thigh pain at 90°, but straight leg raising of the right side caused only midline back pain. The range of motion in claimant's back was "still quite limited." Claimant could forward flex only 30° and his hip flexion angle was only 45°. He had a 20% sensory loss in an L5-and S1 distribution in his left leg,

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[3] "[A] pathologic entity characterized by deossification of a weight-bearing long bone, followed by bending and pathologic fracture, with inability to form normal callus leading to existence of the "false joint" that gives the condition its name." Dorland's Illustrated Medical Dictionary 1374 (28th ed. 1994).

a 20% weakness pattern in his left extensor hallucis longus, and 10% weakness pattern in his left ankle dorsiflexor. (Id.) Dr. Rodgers stated:

> This gentleman's condition is now stable and stationary, although he continues to have significant pain complaints, limitation of motion and problems that preclude his ability to return to gainful employment at Wal-Mart.
>
> I have told him to retire from Wal-Mart, seek Social Security and return to see me down the line only if there is a change in his condition for the worse. I have given him a prescription for Ultram, Pamelor and Relafen 750 mg twice a day as an anti-inflammatory medication that may help.

(R. 250)

On August 4, 1995, Griffith C. Miller, M.D., examined claimant for purposes of providing claimant's lawyer with a disability rating according to AMA guidelines, presumably for a worker's compensation claim. Dr. Miller noted claimant's complaints of severe pain and marked limitation, and he found that claimant had muscle spasm, pain, significant limitation of motion in the spine, appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss. (R. 198-99) He recounted the medical treatment for claimant's spondylolisthesis[4] and opined that claimant would need anti-inflammatory medication, pain medication, and muscle relaxers intermittently in the future. (R. 199-201)[5] Dr. Miller concluded that claimant had 75% permanent partial disability. He stated:

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4 "[F]orward displacement (olisthy) of one vertebra over another, usually of the fifth lumbar over the body of the sacrum or of the fourth lumbar over the fifth, usually due to a developmental defect in the pars interarticularis." Dorland's Illustrative Dictionary 1563 (28th ed. 1994).

5 Dr. Miller erroneously reported that claimant had not worked since January 1995. (R. 201) Claimant reported to Dr. Rodgers on February 20, April 24, and June 22, 1995, that he had been working for 3-4 hours per day. (R. 153, 194, 245) Claimant also reported when he filed his request for hearing that he had been working 4 hours per day. (R. 129)

> Therefore due to this severe injury I feel that Mr. Clifford [sic] will never be able to do physical labor again. Therefore I feel that Mr. May is economically and physically permanently and totally impaired for which he is trained mentally and physically and I feel that this condition is permanent.

(R. 202)

Although the ALJ recited that claimant did not have an impairment which meets or equals the criteria of any listing, he did not mention Listing 1.05C or specifically discuss whether claimant's back problems met or equaled the criteria of Listing 1.05C. After discussing the evidence and explaining why he found that claimant was not disabled due to his diabetes, obesity, or knee problems, the ALJ simply reiterated the medical treatment for claimant's back injury and Dr. Rodgers' findings. (R. 14) He did not mention Dr. Miller's findings until he later explained his reasons for discounting Dr. Miller's report. While Dr. Rodgers and Dr. Miller both discussed claimant's pain, muscle spasm, significant limitation of motion in the spine, and appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss, neither of them specifically addressed whether claimant had a vertebrogenic disorder. Dr. Rodgers did specifically state that he found no evidence of stenosis, continued nerve root compression, or disc herniation above claimant's fusion (R. 247, 249).

However, claimant's doctors diagnosed spondylolisthesis, and Dr. Rodgers indicated that claimant may have pseudoarthrosis. The ALJ specifically found that claimant had lumbar disc disease. It is undisputed that claimant had back surgery to fuse his vertebrae at L5-S1 level, and surgery to remove the hardware from his vertebral column. Vertebrogenic disorder is defined in Listing 1.05C by two examples only. The ALJ did not discuss whether claimant's condition constitutes a vertebrogenic disorder or whether the symptoms, signs and laboratory findings

demonstrate that claimant meets or equals the criteria for Listing 1.05C. His failure to do so constitutes reversible error. Since the evidence is insufficient for the Court to determine if claimant's condition constitutes a vertebrogenic disorder, a medical opinion may be necessary on remand. Because the Court reverses and remands on this issue, the Court need not reach the remaining issues. The Court notes, however, that many of claimant's allegations appear to misstate the record and otherwise lack merit.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. If the Commissioner "failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence." Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case." Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988). The decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

DATED this 25th day of February, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AIRTECH INTERNATIONAL, INC. Plaintiff, vs. DE-COMP COMPOSITES, INC. Defendant.	)	Case No. 99CV0634B(J)

STIPULATION OF DISMISSAL

This lawsuit having been settled through a written settlement agreement, all of the parties to this lawsuit hereby request that all claims and counterclaims in this action, and each of them, be dismissed without prejudice. Each party shall bear its own costs and attorney's fees.

Respectfully submitted,

Phillip L. Free, Jr. /ve

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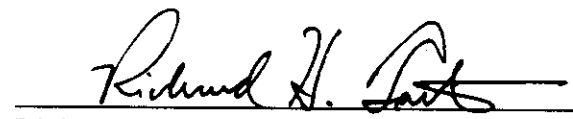

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JOE L. SMITH,)
)
Plaintiff,)
)
vs.) Case No. 98-CV-651-BU
)
CITY OF TULSA,)
)
Defendant.)

ORDER

On February 14, 2000, this Court entered an order directing Plaintiff, Joe L. Smith, to file a response to Defendant, City of Tulsa's motion for summary judgment by February 18, 2000. In the order, the Court advised Plaintiff that if he failed to file a response on February 18, 2000, his case against Defendant would be dismissed without prejudice for failure to comply with the Court's orders and for failure to prosecute this case.

Upon review of the record, it appears that Plaintiff has not filed a response to Defendant's motion for summary judgment as directed by the February 14, 2000 order. Because Plaintiff has not complied with the Court's February 14, 2000 order, the Court finds that Plaintiff's action against Defendant should be dismissed without prejudice.

Based upon the foregoing, Plaintiff, Joe L. Smith's action against Defendant, City of Tulsa, is **DISMISSED WITHOUT PREJUDICE** for failure to comply with the Court's orders and for failure to prosecute this case. In light of the Court's dismissal of this

action, Defendant, City of Tulsa's motion for summary judgment (Docket Entry #53) is **DECLARED MOOT**.

ENTERED this _____ day of February, 2000.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 2 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARILYN J. GRIMMETT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 99-CV-0551 BU(E)**
	)	
R. L. POLK & CO., a Delaware corporation,	)	
	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE FEB 24 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii), the Plaintiff, Marilyn J. Grimmett, and Defendant, R. L. Polk & Co., hereby stipulate that the above-styled cause is dismissed with prejudice, and Plaintiff agrees that all rights, causes of action, claims or other proceedings which she may have, known or unknown, asserted or unasserted, against Defendant are dismissed with prejudice. The Plaintiff stipulates that all claims or causes of action which she may have against Defendant, as well as against any and all supervisors, employees, or agents of Defendant, are released and dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE PER F.R.C.P. 5

I, the undersigned, hereby certify that a true and correct copy of the foregoing document was facsimiled and mailed on the 22nd day of February, 2000, via the U.S. Postal Service, first class mail with proper postage pre-paid and affixed thereon, to:

Paula J. Quillin, Esq.
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Attorneys for Defendant

ON BEHALF OF THE FIRM

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 22 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBIN TURNER O/B/O ROBERT TURNER)
SSN: 444-82-5842)
)
Plaintiff,)
)
v.) Case No. 99-CV-262-J
)
KENNETH S. APFEL, Commissioner)
of the Social Security Administration,)
)
Defendant.)

ENTERED ON DOCKET

DATE FEB 24 2000

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's decision and remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 22 day of February 2000.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBIN TURNER O/B/O ROBERT TURNER, SSN: 444-82-5842
Plaintiff,

vs.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 99-CV-262-J

ORDER[1/]

Plaintiff, Robin Turner, on behalf of her minor son, Robert Turner, and pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits to Robert Turner.[2/] Plaintiff asserts the Commissioner erred because the ALJ failed to properly evaluate the medical evidence, and failed to fully set forth his findings on whether Robert's Attention Deficit Hyperactivity Disorder (ADHD) medically meets or equals a listed impairment or functionally equals a listed impairment. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

[1/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[2/] Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Robert was not disabled on October 31, 1997. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on February 11, 1999. [R. at 4].

1. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff states that her son, Robert, is disabled due to his ADHD, which prevents him from functioning in an age-appropriate manner. [R. at 61]. Robert was born on September 21, 1983, and was 12 years old at the time Plaintiff filed the application for benefits on his behalf. Robert's pediatrician, Dr. Bovasso, diagnosed Robert with ADHD in 1992. [R. at 109]. Robert takes Ritalin, Tofranil and Klonopin for ADHD. [R. at 142].

Plaintiff alleges that Robert's ADHD affects his functioning at school. School records indicate that Robert has been suspended from school for fighting and disruptive behavior or for use of profanity. [R. at 85-87, 89, 90]. A Progress Report from Robert's fifth grade teacher indicates that he does not use classroom instruction time wisely, and does not either complete, or turn in homework assignments. [R. at 84]. Robert also failed to complete make-up school work assigned to him. [R. at 91]. Undated notes from an elementary school parent-teacher conference indicate that Robert has missed a great deal of classtime, that he has not completed his classwork, and that his behavior in the classroom is disruptive. Robert's music or speech teacher noted that he was quiet in that class and seemed almost "medicated." [R. at 92].

Robert's fifth grade teacher, Rebecca Meador, completed a School Activity Report, dated October 15, 1995. [R. at 101-02]. Ms. Meador stated that Robert did not listen to instruction and did not complete his classwork or homework assignments. Ms. Meador stated that Robert was highly disrespectful to adults, that he "backtalks," that he will not do what is asked of him and seems determined to give adults a "hard

time." Ms. Meador also stated that Robert didn't get along with other students, who considered him immature and a "trouble-maker." Because Robert bothered other students, Ms. Meador stated that he was often separated from the other students to enable him to do his work instead of playing. Robert required extra attention from the teacher in keeping his hands, feet and other objects to himself. Ms. Meador characterized Robert as giving up easily, lacking motivation, and choosing not to perform at the level he is capable because he doesn't think learning is important. Ms. Meador noted that Robert had no consequences at home when his school behavior was inappropriate.

Plaintiff testified that Robert has been disciplined for throwing pencils at his teachers. [R. at 36]. His final sixth grade report card recorded all failing grades, except for a "pass" in Art. Summer school was recommended, but Plaintiff testified that the family could not afford to pay the summer school fees. Plaintiff testified that Robert was passed on to the seventh grade because of his age and not his academic standing. [R. 37-38]. Plaintiff testified that Robert frequently misses school, and was absent fifty per cent of the time from school in sixth grade. [R. at 35]. Plaintiff testified that Robert's teachers have difficulty in disciplining him, citing one instance in which his teacher put Robert out in the hallway to do his work, but shortly thereafter found him hanging dangerously from a second floor railing. [R. at 46].

Plaintiff also testified that Robert displayed behavior problems at home. Plaintiff described episodes in which Robert would kick out windows or would kick or punch holes in the walls of his bedroom, and he took the headboard of his bed completely

apart. [R. at 33]. Robert fights with his siblings, kicking, biting and scratching and he cuts his sisters' hair. [R. at 34, 40]. Robert has thrown a screwdriver at his mother's head, wounding her, and has stabbed her with an ink pen. [R. at 34]. Robert curses at his parents and siblings. [R. at 34]. Plaintiff testified that attempts to discipline Robert by spanking or grounding him or taking possessions or privileges away have been unsuccessful. [R. at 45]. Robert doesn't complete assigned chores at home because he can't stay with the task for more than five to ten minutes before he becomes distracted. [R. at 46]. Plaintiff has indicated that Robert requires supervision all the time, and cannot be left alone for any long period of time. [R. at 100].

Robert's medications for his ADHD slow him down and make him calmer. [R. at 39]. Plaintiff testified that Robert's ADHD is treated by his pediatrician, Dr. Bovasso, but that Robert had not seen a psychologist or psychiatrist, because the family could not afford one. [R. at 46].

Plaintiff testified that Robert plays with neighborhood boys after school and before dinner, and that he liked to swim, play football and jump on a neighbor's trampoline. [R. at 43-44, 47]. When inside, Robert plays Sega or computer educational games. [R. at 47]. Plaintiff testified that Robert is not involved with extracurricular activities at school. [R. at 43].

Dr. Paula Monroe, Ph.D., examined Robert at the request of the Commissioner on November 13, 1995. [R. at 135-36]. Dr. Monroe noted Robert had many behavior problems at school, including talking back to his teachers, fighting with other students, and acting violently. Dr. Monroe noted that Robert destroyed property, intentionally

breaking windows and kicking holes in walls. Dr. Monroe further noted that Robert acted aggressively with his mother, siblings and others by throwing things, kicking, biting and scratching, and hitting with objects, and that he threatens family members and others with knives and must be physically restrained. [R. at 135]. Robert admitted that he does not have many friends, but believed that he got along well with the four or five friends he has. Dr. Monroe also noted that Robert indicated he did not like school because it is hard work, that he gets mad when the teacher asks him to do something he does not want to do, and that he was more "mad" now than in the past, characterizing his predominant mood as "mostly mad." Dr. Monroe noted that Robert attempted to refuse taking his medications. Dr. Monroe found Robert had a flat affect and spoke in a monotonic voice.

Robert was referred for testing by Tulsa Public Schools on May 29, 1997, for evaluation of a possible learning disability. [R. at 139-41]. Robert's school reported that his work was inconsistent, he did not apply himself on some occasions, he failed to complete his assignments, he did not complete or attempt an activity, and he was disorganized. The school also reported that Robert was uncooperative, defiant, disruptive in the classroom and distracted other students. Administration of the WISC III test yielded a Verbal IQ score of 82, a Performance IQ score of 84 and a Full Scale IQ score of 82, placing Robert in the low average range of intelligence. Robert's strengths included attention and short-term auditory memory, while his weaknesses were listed as practical knowledge, social judgment, long-term memory and retention of information from experience and education.

At the hearing, Robert testified that he does okay in school, and that he gets good grades, but that he would rather talk to his friends than do his class assignments. Robert testified that he was bored in school last year, but he likes school this year because it is "funner." Robert testified that he becomes mad when he is made to do something he doesn't want to do, and he retaliates by kicking the wall and beating up his sisters. His favorite activities are playing Sega, playing football, jumping on a neighbor's trampoline and watching cartoons. [R. at 48-50].

2. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability standards for children under the Social Security Act were amended in 1996 to provide that

> An individual under the age of 18 shall be considered disabled . . . if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S. C. § 1382c(a)(3)(C)(i). Pursuant to the amended statute, the Commissioner promulgated regulations which provide that a child's impairment or impairments must meet, medically equal or functionally equal in severity a listed impairment in 20 C.F.R. Part 404, Subpt. P Appendix 1, in order to find the child disabled. 20 C.F.R. § 416.924(d)(2). The Commissioner has established a three-step process for the evaluation of child disability claims, requiring a determination of (1) whether the child is engaged in substantial gainful activity, (2) whether the child has a "severe" impairment, and (3) whether that impairment meets, medically equals or functionally equals a listed impairment. See 20 C.F.R. § 416.924.

If the ALJ does not find that the child's impairment meets or medically equals a listed impairment, the ALJ then must consider whether the child's impairment has the same disabling functional consequences as a listed impairment. The Commissioner has established four methods for determining functional equivalence. 20 C.F.R. § 416.926a(b). One method[3/] requires consideration of the child's functional limitations in broad areas of functioning. For children ages three to eighteen years of age, these areas of functioning are categorized as cognition/communication development, motor development, social development, personal development and concentration, persistence and pace. 20 C.F.R. § 416.926a(c)(4). The ALJ rates the functional limitations from the child's impairment in each of the areas of functioning, on a spectrum of severity ranging from "no" limitation to "slight," "moderate," "marked" or "extreme" limitations. A finding of "marked" limitations in two of the areas or an "extreme" limitation in one of the areas is deemed to be functionally equivalent in severity to Listings 112.02 or 112.12. *See* 20 C.F.R.§ 416.926a(c)(3).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

[3/] The other three methods for determining functional equivalence include (1) consideration of limitations of specific functions, such as walking or talking, (2) limitations resulting from chronic illnesses characterized by frequent illnesses or attacks, or by exacerbations and remissions, and (3) limitations resulting from the nature of the treatment required or the effects of medication. 20 C.F.R.§ 416.926a(b).

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[4/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he uses the wrong legal standard or

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[4/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

3. THE ALJ'S DECISION

The ALJ decided Robert was not disabled at step three of the sequential evaluation process for children's disability claims. The ALJ concluded that Robert's ADHD did not medically meet or equal a listed impairment. The ALJ then concluded that Robert's ADHD did not functionally equal in severity a listed impairment. In making his functional equivalence analysis under the broad areas of functioning method, the ALJ found that Robert had moderate limitations in the cognition/communication area of development, no limitations in the motor area of development, slight limitations in the social area of development, moderate limitations in the personal development area and moderate limitations in the area of concentration, persistence and pace.

4. REVIEW

Plaintiff contends in her brief that the ALJ failed to make a full analysis of the record to support his finding that Robert's ADHD did not meet or equal a listed impairment. Plaintiff also contends that the ALJ failed to provide a full analysis of the record to support his findings that Robert's ADHD did not functionally equal in severity any listed impairment.

The ALJ found that Robert's ADHD was a "severe" impairment at step two of the sequential evaluation process. [R. at 14]. The ALJ then concluded that the ADHD did not "meet or equal in severity the criteria for any" listed impairment, and noted that

he had given consideration to listed impairments for childhood mental disorders from 112.02 to 112.12. [R. at 14-15]. No discussion of evidence followed this conclusion.

Although the ALJ identified the childhood mental disorder listings as the category of impairments he considered, he did not identify the specific listed impairments he considered within that category. Since the ALJ identified ADHD as Robert's "severe" impairment at step two, one would expect the ALJ to then discuss at step three, with some particularity, whether Robert evidenced the marked inattention, hyperactivity and impulsiveness, with the accompanying "B" criteria required for Listing 112.11 for ADHD. However, the ALJ did not even identify that particular Listing, much less articulate some analysis of the severity of Robert's ADHD and the rationale he used to find Robert's ADHD did not meet a Listing. The statutes and the Commissioner's regulations require the ALJ to discuss the evidence and explain why he found that Robert's impairment did not meet or medically equal a listed impairment at step three. *See* 42 U.S.C. § 405(b)(1); Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). Particularly in claims for child disability benefits, where consideration of listed impairments is the pivotal point on which a finding of disability will turn, the ALJ must set out his comparison of the evidence with the requirements of the listed impairment. Remand for additional proceedings is therefore necessary to allow the ALJ to set out his specific findings and his reasons for accepting or rejecting the evidence of whether Robert's ADHD met or medically equaled a listed impairment.

The Court is in no way expressing an opinion as to whether Robert's ADHD actually meets or equals a Listing. The Court is limited to reviewing the findings made

by the ALJ and determining if those findings are supported by substantial evidence. The Court is remanding this case to permit the ALJ an opportunity to discuss his conclusions in connection with Listing 112.11 or any other Listing that he finds applicable to Robert's impairment(s). Only then can the Court adequately review the ALJ's decision.

Although this case is remanded for further findings on the issue of whether Robert's ADHD meets or medically equals a listed impairment, the Court notes that Plaintiff also alleged that the ALJ's functional equivalence analysis suffers from a similar failure to set forth discussion of his reasoning in making his findings. While the ALJ briefly noted the evidence he relied on in making his findings in the broad areas of functioning, that recitation of evidence does not indicate that the ALJ considered all the evidence or how he specifically weighed the evidence in reaching his conclusions. "[I]n addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." Clifton, 79 F.3d at 1010.

The ALJ's brief identification of evidence in each of the broad areas of functioning does not explain how he reached his determination that Robert's limitations were "slight" or "moderate" as opposed to "marked" or even "extreme." The ALJ's recitation of certain pieces of evidence for each area of functioning indicates that he placed weight on that evidence. However, the ALJ did not discuss other evidence in the record, and did not discuss why he did not give the undiscussed evidence any weight, or why he did not find it probative. The statutes and regulations requiring the

ALJ to discuss the evidence and explain how he reached his conclusions are equally applicable in the assessment of functional equivalence.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

Dated this 22 day of February 2000.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HARVEY R. MORRIS,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

Case No. 98-CV-679-M

ORDER

On November 10, 1999, this Court reversed the decision of the Commissioner and remanded this case for further proceedings and reconsideration. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of $2,363.20 for attorney fees and $8.54 for costs, for a total award of $2,371.74, for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of $2,363.20 and costs of $8.54 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act,

plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 23rd day of February 2000.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

CATHRYN McCLANAHAN, OBA #14853
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333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH B. LEWIS,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

Case No. 99-CV-422-M

ORDER

On January 7, 2000, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of $2,108.05 for attorney fees and $8.54 for costs, for a total award of $2,116.59, for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of $2,108.05 and costs of $8.54 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to

Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 23rd day of February 2000.

FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

COLUMBIA NATIONAL INSURANCE COMPANY,	)	
PLAINTIFF,	)	
vs.	)	CASE NO. 99-CV-877-K (M)
REROOF AMERICA, INC., an Oklahoma corporation,	)	
DEFENDANT.	)	

REPORT AND RECOMMENDATION

In this action, Plaintiff seeks a declaration that it has no duty to defend and no duty to indemnify Defendant Re-Roof America, Inc., in *DM Hotels of Denver, Inc. v. Re-Roof America, Inc. and McElroy Metals*, Case No. 99 CV 0263, which is pending in the District Court of Colorado. Currently before the Court for Report and Recommendation is Defendant's Motion To Dismiss for Failure to Join an Indispensable Party. [Dkt. 7]. Defendant seeks dismissal under Fed. R. Civ. P. 12(b)(7) for the failure of Plaintiff to join DM Hotels as an indispensable party under Fed. R. Civ. P. 19(b). Alternatively, Defendant seeks a stay of this case pending resolution of *DM Hotels of Denver, Inc. v. Re-Roof America, Inc. and McElroy Metals*, No. 99 CV 0263.

After consideration of the authorities cited by the parties, the Court concludes that Defendant's motion is determined by the analysis in *Winklevoss Consultants, Inc. v. Federal Ins. Co.*, 174 F.R.D. 416 (N.D. Ill. 1997). On the issue of the Plaintiff's duty to defend, an analysis of the factors in Fed. R. Civ. P. 19(a) show that DM Hotels

is not a party to be joined if feasible. Complete relief can be accorded in this action on the issue of Plaintiff's duty to defend without the presence of DM Hotels as a party. DM Hotels has no interest in whether Plaintiff defends Re-Roof in the Colorado action and there is no risk that DM Hotels will incur double, multiple or otherwise inconsistent obligations by resolution of Plaintiff's duty to defend in this litigation without its presence.

Having failed to establish DM Hotels as a party to be joined if feasible under Rule 19(a), Defendant has likewise failed to establish DM Hotels as an indispensable party under Rule 19(b) to support dismissal of the duty to defend claim under Rule 12(b)(7).

Concerning the duty of Plaintiff to indemnify, the Tenth Circuit has determined that it is error to determine the duty to indemnify prior to the resolution of the underlying claim or litigation. *Valley Improvement Association, Inc. v. United States Fidelity & Guaranty Corp.*, 129 F.3d 1108 (10th Cir. 1997); *Culp v. Northwestern Pacific Indemnity Co.*, 365 F.2d 474 (10th Cir. 1966).

It is, therefore, the RECOMMENDATION of the undersigned that Defendant's Motion To Dismiss for Failure to Join an Indispensable Party [Dkt. 7] be denied with respect to the issue of Plaintiff's duty to defend. It is further RECOMMENDED that the Court stay further proceedings in the case concerning Plaintiff's duty to indemnify pending resolution of *DM Hotels of Denver, Inc. v. Re-Roof America, Inc. and McElroy Metals*,No. 99 CV 0263.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections

to this Report and Recommendation must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Haney v. Addison,* 175 F.3d 1217, 1219-20 (10th Cir. 1999), *Talley v. Hesse,* 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States,* 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 23rd day of Feb., 2000.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 24th Day of February, 2000.

C. Padilla, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GARY DEAN CHILDERS,

Plaintiff,

v.

RON CHAMPION,

Defendants.

Case No. 99-CV-0231-E (E)

REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 2254, petitioner Gary Dean Childers filed a Petition for Writ of Habeas Corpus (Docket # 1). After an order directing the petitioner to cure deficiencies in the form and filing of the petition, petitioner refiled his handwritten habeas petition (Docket # 4), filed a habeas petition on the proper form (Docket # 5), and filed a motion for hearing (Docket # 6). Acting *pro se*, petitioner claims that the state was deliberately indifferent to his safety by making him work in unsafe conditions and he sustained physical injury as a result. In a related civil rights action (Case No. 99-CV-84-BU(E)), he seeks monetary relief for loss of earnings as well as compensation for pain and suffering as a result of the injury. In this habeas action, he claims that he was unable to work as a result of the injury and thereby earn early release credits; thus, the state interfered with his liberty interest by lengthening the term of his sentence. He also claims that, a result of his disability, the state removed or withheld early release credits he had previously accumulated.

In defense, respondent filed a motion to dismiss (Docket # 9), asserting that petitioner failed to exhaust his state remedies and that the limitations period under the AEDPA has expired. Petitioner filed a response to respondent's motion (Docket # 13). In addition to his habeas petition and his response to the defendant's motion to dismiss, petitioner has filed a motion for writ of habeas

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corpus ad testificandum (Docket # 10), a motion for appointment of counsel (Docket # 11), a motion in limine (Docket # 12), and a motion for jury trial (Docket # 14).

This case was referred to United States Magistrate Frank H. McCarthy for a report and recommendation. See 28 U.S.C. § 636, and § 2254, Rules 8, 10. By minute order dated August 27, 1999, the matter was reassigned to the undersigned because the case is related to 99-CV-84-BU(E). Based on a review of the record and the parties' briefs, the undersigned proposes a finding that the limitations period for petitioner to file his habeas petition has expired. The undersigned recommends that the respondent's motion to dismiss (Docket # 9) be **GRANTED**, that the petition for writ of habeas corpus (Docket ## 1, 4, and 5) be **DISMISSED**, and that all of petitioner's remaining motions (Docket ## 6, 10, 11, 12, and 14) be **DENIED** as moot.

Background And Procedural History

The injury that petitioner claims to have suffered occurred on March 15, 1995. Petitioner was in the prison medical center for two weeks and then moved to a new cell on March 29, 30, or 31, 1995. A prison guard searched petitioner's cell, found some sort of tool fashioned into a knife, and issued a violation report for possession of contraband. As punishment for this infraction of prison rules, officials at the Dick Conner Correctional Center placed petitioner in disciplinary segregation for 30 days and he lost 100 days of earned early release credits. Documents show that petitioner was reassigned to unemployed status on June 6, 1995, and reclassified again to "medically unassigned" status on July 3, 1995. Petitioner's allegations with regard to his infraction and reassignment are vague, but the violation report and assignment forms appear as part of the record in the related civil rights action (Case No. 99-CV-84-BU(E)).

A document submitted by petitioner in this habeas matter confirms that he was reassigned to unemployed status on June 6, 1995, and he ceased to earn early release credits on that date. (Supp. Resp., Docket # 17, Ex. H.) Petitioner's Consolidated Record Card (CRC), submitted as part of his supplemental response, indicates that petitioner lost 100 credits on April 30, 1995 for a disciplinary infraction, and he lost 168 credits on October 31, 1995 apparently due to a miscalculation by prison officials after he was reclassified to unemployed status. (Id., Ex. I.) Petitioner claims that prison officials placed him on unemployment on July 5, *1996*, but did not officially remove the early release credits from his (CRC) until October 30, *1996*. (Petition, Docket ## 1 and 4, at 2.)

Petitioner filed a "Petition for Writ of Habeas Corpus or Writ of Mandamus" in Osage County District Court on February 28, 1997, challenging the loss of his early release credits allegedly based on the same grounds as his federal habeas petition is based. The Osage County court denied his petition almost a year later, on February 2, 1998, and petitioner filed a petition in error to the Supreme Court of the State of Oklahoma on March 30, 1998 (Case No. O-98-362), seeking mandamus relief. The case was transferred to the jurisdiction of the Oklahoma Court of Criminal Appeals (CCA), and the CCA denied relief on April 15, 1998. The CCA denied relief because petitioner failed to show that he was entitled to immediate release, a prerequisite to a determination of a prisoner's earned credit status under Oklahoma law. (See Motion to Dismiss, Docket # 9, Ex. D.) The Osage County court had denied relief, in part, on the same ground. (Id., Ex. B.) Petitioner filed his petition for writ of habeas corpus in this Court on March 29, 1999.[1]

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[1] Petitioner was permitted to cure the deficiencies in his petition and refile a proper petition for writ of habeas corpus. He did so on April 26, 1999 (Docket # 4) and May 25, 1999 (Docket # 5). Since the case was not dismissed during the interim period before his refiling, his petition is deemed amended, and it relates back to the original filing date of March 29, 1999. See Fed. R. Civ. P. 15(c).

Discussion And Legal Analysis

Habeas corpus actions requiring the review of state court judgments and sentences are governed by 28 U.S.C. § 2254. Section 2254 was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, tit. I, § 104 (1996). The AEDPA's amendments to 28 U.S.C. § 2254 became effective on April 24, 1996. Under the AEDPA,

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented for filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244.

The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence in this matter could be deemed the date of claimant's injury, March 15, 1995, since that is the day he became unable to earn early release credits by working. It could also be April 30, 1995, when credits were removed from his CRC card as

disciplinary measure in response to petitioner's possession of contraband in his prison cell. It could also be deemed the date in June or July, 1995, when prison officials reclassified petitioner as unemployed or medically unassigned because that is when he lost the opportunity to earn early release credits by working. However, respondent has given the petitioner the benefit of the doubt and assumed, for purposes of its motion to dismiss, that the factual predicate for petitioner's claim arose on October 30, *1996*, the date petitioner claims his early release credits were removed (even though the CRC indicates they were removed one year earlier). Under the AEDPA, petitioner thus had until October 30, 1997, in which to file a petition for writ of habeas corpus in federal court. His federal habeas petition, filed on March 29, 1999, is obviously untimely.

However, the time during which his application for post-conviction relief was pending in state court tolled the period of limitations because petitioner filed it within the one-year limitations period. See 28 U.S.C. § 2244(d)(2). He filed his application for post-conviction relief on February 28, 1997, and the CCA denied relief on April 15, 1998, 411 days later. Thus, petitioner had a period of 411 days after October 30, 1997, or until December 15, 1998, within which to file his petition for writ of habeas corpus in this Court. He failed to do so until March 29, 1999, more than three months after the statutory limitations period expired. His petition is not subject to statutory tolling.

In his objection to the motion to dismiss, petitioner made a veiled attempt to indicate to the Court that the limitations period for filing his habeas petition was further tolled by a filing in Mayes County District Court, where he was convicted. (Docket # 13, at 3.) However, the Mayes County documents he submitted were insufficient for the undersigned to determine whether the limitations period was tolled again. Petitioner submitted the front page of the State of Oklahoma's Objection to Motion to Modify or Vacate Sentence, filed in the District Court of Mayes County, Oklahoma on

January 13, 1999 (Case No. CRF-85-63); a receipt from the Office of the Clerk of the Appellate Courts, dated February 16, 1999, indicating that petitioner filed an appeal from the Mayes County District Court in CRF-85-63; and the Court of Criminal Appeals "Order Declining Jurisdiction," dated March 10, 1999. From these materials, the undersigned could not determine the basis for petitioner's motion, the basis of the district court's denial, or the dates that these documents were filed.

Accordingly, the undersigned ordered, on January 21, 2000, that respondent supplement the record by further briefing of the statute of limitations issue in light of petitioner's contention that he had applied for post-conviction relief in Mayes County. Respondent was also directed to provide all relevant state records, including, but not limited to: a complete copy of the docket sheet for Case No. CRF 85-63, Mayes County, Oklahoma; petitioner's Motion to Modify or Vacate Sentence in Case No. CRF 85-63; the State's objection; and any other documents relevant to the statute of limitations issue.

Respondent filed a supplemental response, with the requested documents, on February 10, 2000. (Docket #16.) These materials clearly show that the petitioner was challenging his underlying conviction in the Mayes County action. The loss of petitioner's early release credits was not an issue. As respondent argues, petitioner's conviction is irrelevant to the factual predicate upon which his pending claim is based: the loss of early release credits.

Petitioner filed a supplemental response on February 15, 2000, arguing that respondent was trying to confuse the issue by its submission of the materials requested by the undersigned. (Supp. Resp., Docket # 17.) Apparently petitioner did not understand (or he forgot) that he raised the issue by suggesting that the Mayes County filings tolled the statute of limitations on his claim that the state

wrongfully denied him early release credits. In fact, he admitted that the Mayes County action "has nothing to do with the lost early release credits. Nor the opertunity [sic] to earn them." (Id. at 2.) Even if it were relevant, petitioner filed his Motion to Modify or Vacate Sentence in Mayes County on December 23, 1998 -- after the limitations period expired on December 15, 1998. Claimant's filing of an application for post-conviction relief in Mayes County District Court during the limitations period does not preclude a finding that petitioner's claim falls outside the statutory limitations period.[2]

Petitioner cites Lynce v. Mathis, 519 U.S. 433 (1997), for the proposition that "early release [ ] credits given and used can never be removed" and Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998), for the proposition that "early release credits must be made available to persons with disabilities." (Petition, Docket # 1 and # 4, at 3.) Aside from the fact that these cases do not stand for these propositions, neither of them represents a new recognition of a constitutional right made retroactively applicable to cases on collateral review, as contemplated by 28 U.S.C. § 2254(d)(1)(C), which would toll the statute of limitations in this case. Lynce involved the interpretation of a 1992 Florida statute retroactively canceling early release credits awarded to prison inmates when the population of the state prison system exceeded predetermined levels. The Supreme Court held that the statute violated the Ex Post Facto Clause of the Federal Constitution. Lynce, 519 U.S. at 446-47. The Lynce court excluded consideration of other types of early release

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2 Even if petitioner had filed his petition within the statute of limitations, petitioner could not prevail on the merits because inmates have no constitutional liberty interest in a state's good-time credit scheme, see Hewitt v. Helms, 459 U.S. 460, 467 91983), overruled in part on other grounds by Sandin v. Conner, 515 U.S. 472 (1995), or in prison employment, see Ingram v. Papalia, 804 F.2d 595, 596 (10th Cir. 1986). Further, Oklahoma statutes do not guarantee that inmates will receive work-time credit or an opportunity to work. See Okla. Stat. tit. 57, §§ 138, 224 (1991); see also Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir.1978).

credits earned by the prisoner in that case, and it excluded consideration of credits the prisoner forfeited for disciplinary action. Id. at 436 n. 1.

Petitioner relies on Yeskey, in particular, for his argument that the denial of his early release credits violates the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.* Yeskey held that Title II of the ADA, which prohibits a "public entity" from discriminating against "qualified individual with a disability" on account of that individual's disability, applied to inmates in state prisons. 524 U.S. at 213. The case involved a prisoner who claimed that he was excluded because of health reasons from participation in a boot camp program, the successful conclusion of which would have led to his early release. Id. at 208.

Regardless of whether Yeskey provides any support for petitioner's ADA claim, or whether petitioner even has a valid ADA claim, the Court need not reach the merits of the claim to dismiss it. As respondent argues, the ADA was in effect at the time of the alleged removal of his early release credits in October 30, 1996. Petitioner could have filed an ADA claim at that time or any time within the limitations period. Yeskey may have been the first decision to involve an interpretation of the ADA such that the Act applied to prisoners, but it was not a new recognition of a constitutional right made retroactively applicable to cases on collateral review. See 28 U.S.C. § 2254(d)(1)(C). Yeskey may have been a new recognition of a statutory right, but not a constitutional one. The decision in that case does not toll the statute of limitations.[3]

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[3] Respondent also points out that petitioner failed to raise an ADA claim in his state court application for post-conviction relief. Thus, petitioner has failed to exhaust this claim. See 28 U.S.C. § 2254(c). Since petitioner failed to file his habeas petition within the applicable limitations period, however, the Court need not address the exhaustion issue.

The limitations period of 28 U.S.C. § 2244(d) is not jurisdictional and may be subject to equitable tolling. Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. denied, 119 S. Ct. 210, 142 L. Ed. 2d 173 (1998). Equitable tolling has historically been limited to situations where the petitioner "has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Department of Veteran's Affairs, 498 U.S. 89, 96 (1990) (footnotes omitted). It can also be appropriate where a court or agency makes an incorrect representation that deceives the petitioner. See Johnson v. United States Postal Serv., 861 F.2d 1475, 1481 (10th Cir. 1988). Petitioner has not shown any situation existed which entitles him to equitable relief. [4]

Conclusion

For the reasons cited herein, the undersigned proposes a finding that the limitations period for petitioner to file his habeas petition has expired. The undersigned recommends that the respondent's motion to dismiss (Docket # 9) be **GRANTED**, that the petition for writ of habeas corpus (Docket ## 1, 4, and 5) be **DISMISSED**, and that all of petitioner's remaining motions (Docket ## 6, 10, 11, 12, and 14) be **DENIED** as moot.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the

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[4] Petitioner argues that he would now be entitled to immediate release if he were awarded the early release credits he is due. If that is true, the infirmity upon which the state court made its previous decision is removed. Petitioner may be able to refile in state court and assert that argument, but the statute of limitations bars him, both now and in the future, from bringing that claim in federal court.

matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. §§ 636(b)(1), 2254, Rules 8, 10. **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Judge.** See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999).

Dated this 23rd day of February, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 24th Day of February, 2000.

T. Padilla, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 23 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRENDA MORRIS,

Plaintiff,

vs.

AUTO MARKETING NETWORK, INC.,

Defendant.

Case No. 99-CV-730-BU

ENTERED ON DOCKET
DATE FEB 24 2000

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 23rd day of February, 2000.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE FEB 24 2000

CHRISTOPHER V. LANGSTON,

Plaintiff,

vs.

BERRY DENNEY and CARL LOYD,

Defendants.

No. 00-CV-141-H (E)

FILED
FEB 23 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On July 22, 1999, Plaintiff, a state inmate appearing *pro se*, filed this 42 U.S.C. § 1983 civil rights action in the United States District Court for the Western District of Oklahoma. After being denied leave to proceed *in forma pauperis*, Plaintiff paid the full $150 filing fee required to commence this action. By Order entered September 20, 1999, Plaintiff's complaint was transferred to this district court where it was received by the Clerk of Court on February 14, 2000.

On January 31, 2000, after entry of the transfer Order but prior to receipt of the file in this Court, Plaintiff filed his motion to dismiss (Docket #1-9) in the Western District. In his motion to dismiss, Plaintiff requests that "this case [] be dismissed on the basis of ammunity (sic) on part of Berry Denney as a prosecuter (sic) in the state district court of Delaware Co." Plaintiff also requests that the filing fee of $150 be returned and states that he will file his case "against the proper respondant(s) (sic) in the Northern District Court in Tulsa County."

After receipt of the case in this district court, Plaintiff filed, on February 18, 2000, his "petition to dismiss" (Docket #2), liberally construed as a motion for voluntary dismissal, pursuant to Rule 41(a), Federal Rules of Civil Procedure. In his second motion requesting dismissal, Plaintiff asks that "the honorable Court of the Northern District of Oklahoma to formerly (sic) dismiss the

pending case CIV-99-1054-T, Langston vs Denney. Please file the motion for dismissal with the court clerk and remit formal notice to the respondant (sic)." Plaintiff makes his request for dismissal prior to service of process on the named defendants. Pursuant to Rule 41(a), the Court finds Plaintiff's motion should be granted and this action should be dismissed without prejudice. Plaintiff's prior motion to dismiss, filed in the Western District, has been rendered moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to dismiss (#2) is **granted.**
2. Plaintiff's motion to dismiss, filed in the United States District Court for the Western District of Oklahoma (Docket #1-9) has been rendered **moot.**
3. Plaintiff's civil rights complaint is **dismissed without prejudice.**

IT IS SO ORDERED.

THIS 18TH day of FEBRUARY, 2000.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of Farm Service Agency, formerly Farmers Home Administration,	)	
Plaintiff,	)	
v.	)	
KENNETH P. MCDONALD aka Kenneth McDonald; NED HOSKIN, Full Blood Roll No. 8052, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; NED HOSKIN, JR., Full Blood Roll No. 23898, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; SAM HOSKIN, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; COUNTY TREASURER, Craig County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Craig County, Oklahoma,	)	
Defendants.	)	CIVIL ACTION NO. 99-CV-0735-K (M)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22 day of Feb., 2000. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Craig County, Oklahoma, and Board of County Commissioners, Craig County, Oklahoma, appear by Clint Ward, Assistant District Attorney, Craig County, Oklahoma; and Defendants, Kenneth P. McDonald aka Kenneth McDonald; Ned Hoskin, Full Blood Roll No. 8052, if living, and if

deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; Ned Hoskin, Jr., Full Blood Roll No. 23898, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; and Sam Hoskin, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Kenneth P. McDonald aka Kenneth McDonald, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to addressee, on September 2, 1999.

The Court further finds that the Defendants, Ned Hoskin, Full Blood Roll No. 8052, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; Ned Hoskin, Jr., Full Blood Roll No. 23898, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; and Sam Hoskin, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns, were served by publishing notice of this action in the Vinita Daily Journal, a newspaper of general circulation in Craig County, Oklahoma, once a week for six (6) consecutive weeks beginning October 14, 1999, and continuing through November 18, 1999, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants,

Ned Hoskin, Full Blood Roll No. 8052, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; Ned Hoskin, Jr., Full Blood Roll No. 23898, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; and Sam Hoskin, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Ned Hoskin, Full Blood Roll No. 8052, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; Ned Hoskin, Jr., Full Blood Roll No. 23898, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; and Sam Hoskin, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of Farm Service Agency, formerly Farmers Home Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court

accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Craig County, Oklahoma, and Board of County Commissioners, Craig County, Oklahoma, filed their Answer and Cross-Petition on or about September 9, 1999; that Defendants, Kenneth P. McDonald aka Kenneth McDonald; Ned Hoskin, Full Blood Roll No. 8052, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; Ned Hoskin, Jr., Full Blood Roll No. 23898, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; and Sam Hoskin, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of mortgages securing said promissory notes upon the following described real property located in Craig County, Oklahoma, within the Northern Judicial District of Oklahoma:

> The S/2 NE/4 SE/4, less the West 250 feet thereof; and the N/2 SE/4 SE/4, less the West 250 feet of the North 200 feet thereof; and the SE/4 SE/4 SE/4 of Section 13; and the NW/4 NE/4; and all that part of the NE/4 NE/4 and the S/2 NE/4 lying North of the St. Louis and San Francisco Railroad Right of Way of Section 24; all in Township 25 North, Range 20 East of Indian Meridian; AND, the South 20.49 acres of Lot 2; and the SW/4 SE/4 NW/4; and the N/2 NE/4 SW/4; and all that part of Lots 3 and 4 and the SE/4 SW/4 lying West of the Little Cabin Creek and North

of the railroad; and all that part of the S/2 NE/4 SW/4 lying North and East of the Little Cabin Creek of Section 18; and all that part of Lot 1, lying North of the St. Louis and San Francisco Railroad right of way, of Section 19; all in Township 25 North, Range 21 East of Indian Meridian, according to the United States Government Survey thereof.

The Court further finds that on The Defendant, Kenneth P. McDonald aka Kenneth McDonald, executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Farm Service Agency, the following promissory notes.

Loan Number	Original Amount	Date	Interest Rate
41-01*	$143,770.00	09/20/83	10.75%
41-04**	187,006.69	09/26/86	5.00%
41-08	170,612.11	04/11/89	5.00%
44-05	10,000.00	05/03/90	5.50%

*Reamortized to 41-04 **Reamortized to 41-08

The Court further finds that on April 11, 1989, Defendant, Kenneth P. McDonald aka Kenneth McDonald, executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Farm Service Agency, a shared appreciation agreement.

The Court further finds that as security for the payment of the above-described notes, the Defendant, Kenneth P. McDonald aka Kenneth McDonald, executed and delivered to the United States of America, acting through Farmers Home Administration, now known as Farm Service Agency, the following real estate mortgages.

Document	Dated	Filing Date	County	Book / Page
Real Estate Mortgage	09/20/83	09/20/83	Craig	336 / 698
Real Estate Mortgage	04/11/89	04/14/89	Craig	370 / 285

These mortgages cover the above-described property, situated in the State of Oklahoma, Craig County.

The Court further finds that the Defendant, Kenneth P. McDonald aka Kenneth McDonald, made default under the terms of the aforesaid notes and mortgages by reason of his failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendant, Kenneth P. McDonald aka Kenneth McDonald, is indebted to the Plaintiff in the principal sum of $174,041.09, plus accrued interest in the amount of $59,393.43 as of August 27, 1998, plus interest accruing thereafter at the rate of $23.8974 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that James Fields, Area Director of the Five Civilized Tribes, was served by Donald G. Abdallah, Acting United States Marshal for the Eastern District of Oklahoma, with a copy of the Notice To The Area Director Of The Five Civilized Tribes Of The Pendency Of An Action and a certified copy of the Complaint filed in said cause, Case No. 99-CV-0735-K (M), in the United States District Court for the Northern District of Oklahoma, on September 3, 1999, as shown on the Marshal's Return of Service filed on September 9, 1999. Records maintained by the Cherokee Nation reveal that the property in Section 13

was allotted to Ned Hoskin, and Sam Hoskin inherited the property and received a 1955 Removal of Restrictions in 1959. As a result of these conveyances, the land is no longer restricted against alienation by federal law.

The Court further finds that all ad valorem taxes due on the subject property have been paid; therefore, Defendant, County Treasurer, Craig County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, Board of County Commissioners, Craig County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Kenneth P. McDonald aka Kenneth McDonald; Ned Hoskin, Full Blood Roll No. 8052, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; Ned Hoskin, Jr., Full Blood Roll No. 23898, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; and Sam Hoskin, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, on behalf of Farm Service Agency, formerly Farmers Home Administration, have and recover judgment against the Defendant, Kenneth P. McDonald aka Kenneth McDonald, in the principal sum of $174,041.09, plus accrued interest in the amount of $59,393.43 as of August 27, 1998, plus

interest accruing thereafter at the rate of $23.8974 per day until judgment, plus interest thereafter at the current legal rate of 6.287 percent per annum until paid, plus the costs of this action in the amount of $10.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Area Director of the Five Civilized Tribes acting on behalf of the Cherokee Nation has no right, title or interest in the subject real property as evidenced by letter dated September 17, 1999.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Kenneth P. McDonald aka Kenneth McDonald; Ned Hoskin, Full Blood Roll No. 8052, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; Ned Hoskin, Jr., Full Blood Roll No. 23898, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; Sam Hoskin, if living, and if deceased, his heirs, executors, administrators, devisees, trustees, successors and assigns; and County Treasurer and Board of County Commissioners, Craig County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Kenneth P. McDonald aka Kenneth McDonald, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the

United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

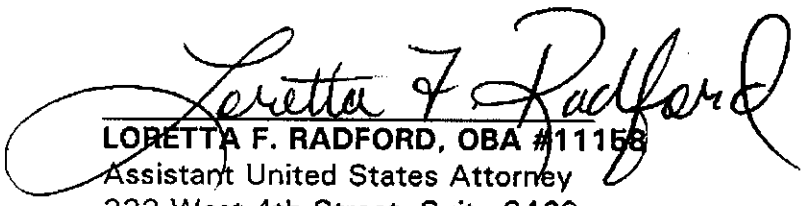
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

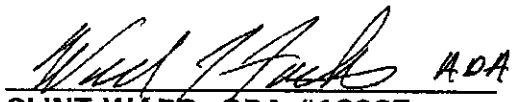
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463



CLINT WARD, OBA #12027
Assistant District Attorney
301 West Canadian Avenue
Vinita, Oklahoma 74301
(918)
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Craig County, Oklahoma

Judgment of Foreclosure
Case No. 99-CV-0735-K (M) (McDonald)

LFR:css

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH J. LeBLANC, III, Individually and as Testamentary Executor of the Successions of Joseph J. LeBlanc, Jr. and Audrey B. LeBlanc, and as Personal Representative of Decedents, Joseph J. LeBlanc, Jr., and Audrey B. LeBlanc, and/or for and on behalf of the Successions (Estates) of Joseph J. LeBlanc, Jr., and Audrey B. LeBlanc, LISA LeBLANC DUFRIEND and LAURIE LeBLANC BECNEL,

Plaintiffs,

vs.

DIVCO, INC., WEST STAR AVIATION, INC.; UNISON INDUSTRIES, INC., formerly known as SLICK ELECTRO, INC., and/or SLICK AIRCRAFT PRODUCTS, AVCO CORPORATION, TEXTRON, INC., and TEXTRON INDUSTRIES, INC.

Defendants.

Case No. 99-CV-0508-B (E)

ORDER OF DISMISSAL AS TO TEXTRON INDUSTRIES, INC.

On this 18th day of February, 2000, the stipulation of the parties for dismissal of Textron Industries, Inc. as set forth in the Case Management Plan comes before the court for consideration. The court, being fully advised in the premises hereby orders, adjudges and decrees that Textron Industries, Inc. should be and is hereby dismissed without prejudice to refiling.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DWAYNE M. GARRETT,

Plaintiff,

v.

CITY OF NOWATA, Phillip Ogden; SHELLY CLEMENES, for the State of Oklahoma City of Nowata; JERRY MADDUX, city attorney for the City of Nowata; JIM HALLUT, sheriff, City of Nowata; HELEN JO YELTON, county treasurer, City of Nowata; JACK DUGGER, county commissioner, City of Nowata; CHARLES PARKER, county commissioner, City of Nowata; DUKE EPPERSON, county commissioner, City of Nowata; JOE AKERS, county commissioner, City of Nowata,

Defendants.

Case No. 99-CV-408-K (E)

ORDER

By Order, filed January 13, 2000, the Court gave Plaintiff twenty days in which to serve the Defendants with a summons and complaint or face dismissal of this case under Fed. R. Civ. P. 4(m). Plaintiff has failed to comply with this Order, having failed to serve any of the Defendants.

IT IS THEREFORE ORDERED that the above-captioned case is DISMISSED WITHOUT PREJUDICE.

ORDERED this 22 day of February, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUSA Life Insurance Company, Inc., et al.,

Plaintiffs,

vs.

William R. Bartmann, et al.,

Defendants.

Case No. 99-CV-0825C(J)

NOTICE OF PARTIAL DISMISSAL WITHOUT PREJUDICE

Defendant Chase Securities, Inc., by and through its counsel of record, Thomas C. Rice of the law firm Simpson Thacher & Bartlett, gives notice of dismissal without prejudice to Defendant, Charles S. Welsh.

Respectfully Submitted

Thomas C. Rice /eof

Thomas C. Rice (NYS 1829829)
Elizabeth A. Fuerstman (NYS 2504272)
Simpson Thacher & Bartlett
425 Lexington Avenue
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Michael A. O'Connor (NYS 1922848)
Chase Manhattan Legal Department
The Chase Manhattan Bank
1 Chase Manhattan Plaza, 26th Floor
New York, NY 10081
Tel: (212) 552-1693
Fax: (212) 552-1295

Attorneys for Chase Securities, Inc.

CERTIFICATE OF SERVICE

I certify that on the 16th day of February, 2000, a true and correct copy of the foregoing was served by First Class U.S. Mail on the following:

David L. Bryant
400 Beacon Building
406 S. Boulder Avenue
Tulsa OK 74103

Thomas R. Seymour
550 Oneok Plaza
Tulsa OK 74103

Tony M. Graham
Feldman Franden Woodard & Farris
525 South Main
Tulsa OK 74103

James M. Reed
Hall Estill Hardwick Gable
Golden & Nelson
320 South Boston
Tulsa OK 74103

Terry W. Tippins
John B. Heatly
Eric S. Eissenstat
Fellers, Snider, Blankenship, Barley & Tippens, PS
Bank One Tower
100 N. Broadway, Suite 1700
Oklahoma City, OK 73102-8820

P. David Newsome, Jr.
Connor & Winters
3700 First Place Tower
15 E. 5th St.
Tulsa OK 74103

Jeffrey T. Gilbert
Sachnoff & Weaver, Ltd
30 South Wacker Drive, Suite 2900
Chicago IL 60606

Hannah Y. Yang

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DWAYNE GARRETT,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE FEB 24 2000
	)	
v.	)	**Case No. 99-CV-716-K (E)**
	)	
STATE OF OKLAHOMA and JOE L. WHITE,	)	**F I L E D**
	)	FEB 22 2000
	)	
Defendants.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

By Order, filed January 13, 2000, the Court gave Plaintiff twenty days in which to serve the remaining defendant, the State of Oklahoma, with a summons and complaint or face dismissal of this case under Fed. R. Civ. P. 4(m). Plaintiff has failed to comply with this Order, having failed to serve the State of Oklahoma with a complaint.

IT IS THEREFORE ORDERED that Plaintiff's causes of action against Defendant State of Oklahoma are DISMISSED WITHOUT PREJUDICE.

ORDERED this 22 day of February, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STELLA IRENE CARROLL,	)	
Personal representative of the	)	
Estate of BILLY JOE CARROLL,	)	ENTERED ON DOCKET
Deceased,	)	DATE FEB 24 2000
	)	
Plaintiff,	)	
	)	
v.	)	**No. 98-CV-727-K (M)**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

FILED
FEB 22 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes on before the Court upon the stipulation of all parties and the Court, being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, Stella Irene Carroll, Personal Representative of the Estate of Billy Joe Carroll, Deceased, against the United States of America and all claims asserted by the United States of America in its counterclaim and third party petition are hereby dismissed with prejudice.

Dated this 22 day of February 2000.

TERRY C. KERN
United States District Judge

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ATTORNEYS FOR PLAINTIFF

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(918) 599-9090

and

Scott D. Hjelm, OBA #15624
717 South Houston, Suite 300
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(918) 599-9090

ATTORNEYS FOR DEFENDANT

Harlan S. Pinkerton, Jr., OBA #7164
Fred C. Cornish, Inc.
610 Beacon Bldg., 406 S. Boulder
Tulsa, Oklahoma 74103-3825
(918) 583-2284

and

STEPHEN C. LEWIS
United States Attorney

Wyn Dee Baker, OBA #465
Assistant United States Attorney
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Tulsa, Oklahoma 74103
9918) 581-7463

ATTORNEY FOR THIRD PARTY DEFENDANT

Thomas E. Baker, OBA #11045
2431 East 51st Street, Suite 306
Tulsa, Oklahoma 74105

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOE MORGAN and TONYA MORGAN,	)	
Plaintiffs,	)	
v.	)	**Case No. 99-CV-350-K (M)**
MICHAEL LEVI THOMAS and DEBRA THOMAS,	)	
Defendants.	)	

ORDER

Before the Court is Plaintiff's motion asking the Court to exercise supplemental jurisdiction over their claims against Defendants. On March 16, 1999, Plaintiffs filed suit in Oklahoma state court, asserting assault and battery, loss of consortium, intentional infliction of emotional distress, and negligence against Defendants. Defendants counterclaimed, asserting violation of their constitutional rights, embodied in the Fourth, Fifth, and Eight Amendments; negligence; violation of statutory civil rights; assault and battery; false arrest; and false imprisonment. Plaintiffs, as counterclaim defendants, then removed to this Court based on federal question jurisdiction. *See* 28 U.S.C. § 1441(b). Plaintiffs have filed the motion at issue, asking the Court to exercise supplemental jurisdiction over their state law claims.

Because the Court finds removal was improper in this case, the Court denies

Plaintiffs' motion and remands this case to Tulsa County District Court. The well-pleaded complaint rule applies to removal jurisdiction. Therefore, the federal claim must be asserted in the plaintiff's complaint and not merely as a defense or in the defendant's counterclaim. *See Schmeling v. NORDAM*, 97 F.3d 1336, 1339 (10th Cir. 1996); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 822 (9th Cir. 1985). Plaintiffs' complaint raises only questions of state law.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Exercise Supplemental Jurisdiction (# 3) is DENIED and this case is remanded to the District Court for Tulsa County, State of Oklahoma, for further proceedings.

ORDERED this 22 day of February, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAMELA P. JONES, et al.,

Plaintiffs,

vs.

CITY OF BROKEN ARROW, et al,

Defendants.

No. 98-CV-479-K

ORDER

Before the Court is the motion of the defendant City of Broken Arrow ("the City") for summary judgment. Plaintiffs bring this action asserting claims under federal and state law. On April 25, 1997, Keith Jones (the stepfather of Zachary Nobile), called the Broken Arrow 911 emergency operator and advised that Nobile had apparently gone beserk and was in his bedroom with a large machete, a fixed blade knife and a pellet pistol. Officers Walls and Helveston of the Broken Arrow Police Department were dispatched. After their arrival, Walls and Helveston attempted to talk to Nobile, who pulled the pellet pistol out of his waistband and aimed it at the officers. The officers recognized it as a pellet pistol. Nobile attempted to fire the pistol at the officers, but it failed to discharge. Nobile put the pistol aside and picked up a large machete. Walls and Helveston were unable to get Nobile to put the machete down, despite spraying him in the face with pepper spray at one point.

Approximately ten minutes after the officers' arrival, Helveston called the Broken Arrow Police dispatch and requested that Sergeant Ferguson, the on-duty shift supervisor, come to the

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scene. Ferguson headed toward the Jones home and asked the dispatcher to send a fourth officer to the scene. Mr. and Mrs. Jones, Nobile's stepparents, have testified that shortly after his arrival, Ferguson looked at his watch and said "We have to take him now." Ferguson directed a stratagem, which proved unsuccessful, of having another officer throw a brick threw Nobile's bedroom window from the outside to distract Nobile. The officers have testified that Nobile was becoming increasingly aggressive with the machete, swinging it in an "X" pattern, and telling the officers to bow down before him so he could cut off their heads. Under Ferguson's direction, Nobile was sprayed in the face with pepper spray two or three additional times as he advanced too close to the officers. Mr. and Mrs. Jones have testified that a coffee table was partially barricading the door to Nobile's bedroom from the inside during the encounter, so that Nobile would have had to slip through a narrow opening sideways to actually reach the officers.

About eight minutes after he arrived, Ferguson called the dispatcher and requested the Broken Arrow Police Department Special Operations Team ("SOT") be sent to assist disarming Nobile. Nobile was subsequently sprayed with pepper spray two more times as the officers perceived an aggressive movement toward them. There is testimony that the pepper spray became so thick in the air that it bothered the officers themselves. Finally, under the officers' version of events, Nobile approached Walls with the machete raised. Walls retreated down the hallway several steps and repeatedly asked Nobile to put down the machete. Nobile continued his advance, and as Nobile entered his bedroom doorway, Walls fired his handgun once and Nobile fell back into the bedroom. Nobile was shot approximately twenty-four minutes after Walls arrived at the house. As stated, the stepparents contend that Nobile could not have left the bedroom without difficulty, and that he was killed while still inside his bedroom.

The Court construes the factual record and the reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. See Byers v. City of Albuquerque, 150 F.3d 1271, 1274 (10th Cir.1998). Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) F.R.Cv.P. An issue of material fact is genuine only if a party presents facts sufficient to show that a reasonable jury could find in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

First, the City relies upon the principle that absent an underlying constitutional violation by a police officer, there can be no action against the municipality or the officer's supervisors for failing to train or supervise the officer. See Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445, 1447 (10th Cir.1990). The Court has ruled in denying motions for summary judgment by individual officers in this case that genuine issues of material fact remain as to whether a constitutional violation took place; accordingly, summary judgment cannot be granted to the City on this ground.

As to plaintiffs' §1983 claims, the municipality can only be liable when the alleged constitutional transgression implements or executes a policy, regulation or decision officially adopted by the governing body or informally adopted by custom. Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3rd Cir.1996). Evidence of a pattern of violations is not necessary. Evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability. Allen v. Muskogee, 119 F.3d 837, 842 (10th Cir.1997).

Plaintiff has presented evidence, which the City has not contradicted by filing a reply brief, of expert testimony questioning the police training procedures of the City. Plaintiff has also

presented evidence that the City ratified the conduct of the officers in this case through its subsequent investigation. A municipality also can be liable for an isolated constitutional violation if the final policymaker "ratified" a subordinate's decisions. See City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988). Ordinarily, ratification is a question for the jury. Christie v. Iopa, 176 F.3d 1231, 1238-39 (9th Cir.1999). Summary judgment will not be granted on plaintiff's §1983 claims, with the exception that plaintiff concedes she cannot recover punitive damages against a municipality.

As to plaintiff's state law claims (negligent hiring and infliction of emotional distress), the City argues that the Governmental Tort Claims Act provides immunity under 51 O.S. §155(6). This contention has been rejected by the Oklahoma Supreme Court. The statutory immunity for providing protective services does not immunize common-law negligence for carrying out law enforcement duties. Salazar v. City of Oklahoma City, 976 P.2d 1056, 1066 (Okla.1999). However, plaintiff again concedes that punitive damages are not recoverable against the City. 51 O.S. §154(B).

It is the Order of the Court that the motion of the defendant City of Broken Arrow for summary judgment (#53) is hereby GRANTED solely as to any claim for punitive damages against the municipality itself. In all other respects, the motion is DENIED.

SO ORDERED THIS 22 DAY OF FEBRUARY, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

DAVID STEPHENS EDDINGS
aka David S. Eddings;
LINDA J. EDDINGS aka Linda J. Casey;
DAVID LEE EDDINGS aka David L. Eddings
aka David Eddings;
NOMA J. BRUTON;
LAWRENCE A. MARTIN;
STATE OF OKLAHOMA ex rel.
Oklahoma Tax Commission;
COUNTY TREASURER, Pawnee County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Pawnee County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE FEB 23 2000

FILED
FEB 22 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 99-CV-0506-K (M)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22 day of February, 2000. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendants, County Treasurer, Pawnee County, Oklahoma, and Board of County Commissioners, Pawnee County, Oklahoma, appear by Alan B. Foster, Assistant District Attorney, Pawnee County, Oklahoma; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears not, having previously filed its Disclaimer; and the Defendants, David Stephens Eddings aka David S. Eddings, Linda J. Eddings aka Linda J. Casey, David Lee Eddings aka

David L. Eddings aka David Eddings, Noma J. Bruton, and Lawrence A. Martin, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Lawrence A. Martin, executed a Waiver of Service of Summons on July 13, 1999.

The Court further finds that the Defendants, David Stephens Eddings aka David S. Eddings, Linda J. Eddings aka Linda J. Casey, David Lee Eddings aka David L. Eddings aka David Eddings, and Noma J. Bruton, were served by publishing notice of this action in the Pawnee Chief, a newspaper of general circulation in Pawnee County, Oklahoma, once a week for six (6) consecutive weeks beginning September 29, 1999, and continuing through November 3, 1999, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, David Stephens Eddings aka David S. Eddings, Linda J. Eddings aka Linda J. Casey, David Lee Eddings aka David L. Eddings aka David Eddings, and Noma J. Bruton, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, David Stephens Eddings aka David S. Eddings, Linda J. Eddings aka Linda J. Casey, David Lee Eddings aka David L. Eddings aka David Eddings, and Noma J. Bruton. The Court conducted an inquiry

into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Pawnee County, Oklahoma, and Board of County Commissioners, Pawnee County, Oklahoma, filed their Answer on July 8, 1999; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on or about July 19, 1999; and that the Defendants, David Stephens Eddings aka David S. Eddings, Linda J. Eddings aka Linda J. Casey, David Lee Eddings aka David L. Eddings aka David Eddings, Noma J. Bruton, and Lawrence A. Martin, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage upon the following described real

property located in Pawnee County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lots 1, 2, 3, 10, 11 and 12, Block 28 in the Original Town of Blackburn, Pawnee County, State of Oklahoma.

The Court further finds that on December 14, 1976, David Stephens Eddings and Linda J. Eddings executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $12,500.00, payable in monthly installments, with interest thereon at the rate of 8 percent per annum.

The Court further finds that as security for the payment of the above-described note, David Stephens Eddings and Linda J. Eddings, husband and wife, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated December 14, 1976, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on December 20, 1976, in Book 189, Page 89, in the records of Pawnee County, Oklahoma.

The Court further finds that Defendants, David Stephens Eddings aka David S. Eddings and Linda J. Eddings aka Linda J. Casey, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and

mortgage, after full credit for all payments made, the principal sum of $4,758.11, plus administrative charges in the amount of $617.00, plus penalty charges in the amount of $73.80, plus accrued interest in the amount of $638.65 as of March 24, 1998, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Pawnee County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of 1997 and 1998 personal property taxes in the amount of $48.92. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Pawnee County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, David Stephens Eddings aka David S. Eddings, Linda J. Eddings aka Linda J. Casey, David Lee Eddings aka David L. Eddings aka David Eddings, Noma J. Bruton, and Lawrence A. Martin, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment **in rem** against Defendants, David Stephens Eddings aka David S. Eddings and Linda J. Eddings aka Linda J. Casey, in the principal sum of $4,758.11, plus administrative charges in the amount of $617.00, plus penalty charges in the amount of $73.80, plus accrued interest in the amount of $638.65 as of March 24, 1998, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, plus the costs of this action in the amount of $8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Pawnee County, Oklahoma, have and recover judgment in the amount of $48.92, plus interest and penalties, by virtue of 1997 and 1998 personal property taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, David Stephens Eddings aka David S. Eddings, Linda J. Eddings aka Linda J. Casey, David Lee Eddings aka David L. Eddings aka David Eddings, Noma J. Bruton, Lawrence A. Martin, State of Oklahoma ex rel. Oklahoma Tax

Commission, and Board of County Commissioners, Pawnee County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Plaintiff;

Third:
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Pawnee County, Oklahoma.

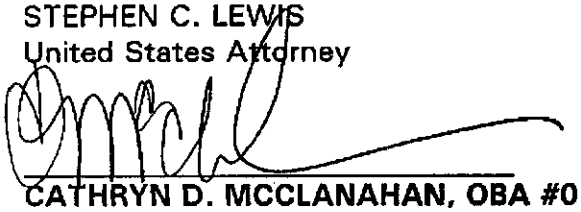
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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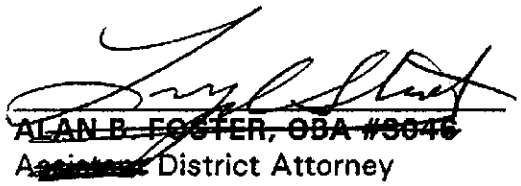

~~ALAN B. FOSTER, OBA #3046~~
~~Assistant~~ District Attorney
Pawnee County Courthouse - Room 301
500 Harrison
Pawnee, Oklahoma 74058
(918) 762-2555
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Pawnee County, Oklahoma

Judgment of Foreclosure
Case No. 99-CV-0508-K (M) (Eddings)

CDM:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

DAROLD G. PHILLIPS
aka Darold Gene Phillips;
SPOUSE, if any, OF DAROLD G. PHILLIPS
aka Darold Gene Phillips;
TRACY M. PHILLIPS aka Tracy Smithwick
aka Tracy M. Smithwick;
SPOUSE, if any, OF TRACY M. PHILLIPS
aka Tracy Smithwick aka Tracy M. Smithwick;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE FEB 23 2000

FILED
FEB 22 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 99-CV-0688-K (E)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22 day of February, 2000. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Darold G. Phillips aka Darold Gene Phillips; Spouse, if any, of Darold G. Phillips aka Darold Gene Phillips; Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick; and Spouse, if any, of Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Darold G. Phillips aka Darold Gene Phillips, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on August 19, 1999.

The Court further finds that the Defendants, Spouse, if any, of Darold G. Phillips aka Darold Gene Phillips; Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick; and Spouse, if any, of Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning December 2, 1999, and continuing through January 6, 2000, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Spouse, if any, of Darold G. Phillips aka Darold Gene Phillips; Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick; and Spouse, if any, of Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Spouse, if any, of Darold G. Phillips aka Darold Gene Phillips; Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick; and Spouse, if any, of Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick. The Court conducted an inquiry into the

sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on September 13, 1999; and that the Defendants, Darold G. Phillips aka Darold Gene Phillips; Spouse, if any, of Darold G. Phillips aka Darold Gene Phillips; Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick; and Spouse, if any, of Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

The West 101.5 feet of Lot One (1), HOME GARDENS ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 21, 1993, Darold G. Phillips and Tracy M. Phillips executed and delivered to Mercury Mortgage Co., Inc. their mortgage note in the amount of $27,800.00, payable in monthly installments, with interest thereon at the rate of 8.0 percent per annum.

The Court further finds that as security for the payment of the above-described note, Darold G. Phillips and Tracy M. Phillips executed and delivered to Mercury Mortgage Co., Inc., a real estate mortgage dated May 21, 1993, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on June 3, 1993, in Book 5509, Page 0487, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 30, 1996, Mercury Mortgage Co., Inc. assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Assignment of Mortgage was recorded on November 5, 1996, in Book 5858, Page 2369, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 14, 1997, Darold G. Phillips executed and delivered to the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due on that date was made principal and the interest rate changed to 7.5 percent per annum.

The Court further finds that the Defendants, Darold G. Phillips aka Darold Gene Phillips and Tracy M. Phillips aka Tracy Smithwick aka Tracy M.

Smithwick, made default under the terms of the aforesaid note, mortgage and modification and reamortization agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Darold G. Phillips aka Darold Gene Phillips and Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick, are indebted to the Plaintiff in the principal sum of $28,048.17, plus administrative charges in the amount of $165.00, plus penalty charges in the amount of $23.52, plus accrued interest in the amount of $4,300.10 as of September 11, 1998, plus interest accruing thereafter at the rate of 7.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, Darold G. Phillips aka Darold Gene Phillips; Spouse, if any, of Darold G. Phillips aka Darold Gene Phillips; Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick; and Spouse, if any, of Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against the Defendants, Darold G. Phillips aka Darold Gene Phillips and Tracy M. Phillips aka Tracy

Smithwick aka Tracy M. Smithwick, in the principal sum of $28,048.17, plus administrative charges in the amount of $165.00, plus penalty charges in the amount of $23.52, plus accrued interest in the amount of $4,300.10 as of September 11, 1998, plus interest accruing thereafter at the rate of 7.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 6.287 percent per annum until paid, plus the costs of this action in the amount of $8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Darold G. Phillips aka Darold Gene Phillips; Spouse, if any, of Darold G. Phillips aka Darold Gene Phillips; Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick; Spouse, if any, of Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Darold G. Phillips aka Darold Gene Phillips and Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof..

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

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DICK A. BLAKELEY, OBA #0852
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406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4835
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 99-CV-0688-K (E) (Phillips)

CDM:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	ENTERED ON DOCKET
	)	FEB 23 2000
Plaintiff,	)	DATE
	)	
v.	)	CIVIL ACTION NO. 97-CV-507-K (J)
	)	
ONE 1992 CHEVROLET 3500 4-DOOR DUALLY PICKUP TRUCK, VIN #1GCHK34F0NE194813; et. al.	)	FILED
	)	FEB 22 2000
	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)	

FOURTH PARTIAL JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Fourth Partial Judgment of Forfeiture by Default and by Withdrawal of Claims and the Declaration in Support thereof as to the following defendant vehicles ("default vehicles"):

a) 1990 Chevrolet C1500 Pickup Truck, VIN #2GCFC29K9L1108689;

b) 1989 Chevrolet One Ton Dually Pickup Truck, VIN #1GCHC34N5KE126233;

c) 1989 GMC 1500 Pickup Truck, VIN #1GTDC14Z3KZ510168;

d) 1990 Chevrolet Pickup Truck VIN #1GCDC14ZXLE219689;

e) 1992 Chevrolet One-Ton Pickup Truck, VIN #2GCHC39N1N1177632;

f) 1982 Chevrolet Car Hauler, VIN #1GCHC33J0CS127341;

and all entities and/or persons interested in the default vehicles, the Court finds as follows:

20

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 27th day of May, 1997, alleging that the default vehicles are subject to forfeiture pursuant to Title 18 U.S.C. § 512(a)(1), which provides that if an identification number for a motor vehicle or motor vehicle part is removed, obliterated, tampered with, or altered, such vehicle or part shall be subject to seizure and forfeiture to the United States of America, and pursuant to 18 U.S.C. § 981(a)(1)(F), which provides that any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of § 511 (altering or removing motor vehicle numbers); § 2312 (transporting stolen vehicles in interstate commerce); or § 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce), is subject to seizure and forfeiture to the United States.

Warrant of Arrest and Notice *In Rem* was issued on the 4th day of June 1997, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant vehicles and/or parts, trailer, and crusher and for publication in the Northern District of Oklahoma.

The United States Marshals Service served a copy of the Complaint for Forfeiture *In Rem* and the Warrant of Arrest and Notice *In Rem* on the defendant vehicles on August 26, 1997.

On February 9, 1998, a Partial Judgment of Forfeiture was entered forfeiting the following described defendant vehicles to the United States of America for disposition according to law:

a) One 1994 Chevrolet Silverado Suburban 1500, VIN 1GNEC16K4RJ426042;

b) One 1990 Chevrolet C1500, Pickup Truck, VIN 1GCDC14K9LZ220862;

c) One 1988 Chevrolet Silverado 1500 Pickup Truck, VIN 2GCFC29K4J1139085;

d) One 1988 GMC Cab and Chassis Extended Cab Pickup Truck, VIN 1GTDC14K5JE534710;

e) One 1996 Chevrolet Cab and Chassis Extended Cab Pickup Truck, VIN 1GCEC19R0VE101053;

f) One White Z-71 Short Narrow Bed Pickup Truck Trailer, VIN Number Unknown;

g) One Beckham Black Box Trailer, SN 1BTT2620XTAB12167.

On July 22, 1998, a Second Partial Judgment of Forfeiture was entered forfeiting the following described defendant vehicles to the United States of America for disposition according to law:

a) One 1992 Chevrolet 3500 Dually Pickup Truck, VIN 1GCHK34F0NE194813;

b) One 1993 Chevrolet C-10 Pickup Truck, VIN 1GCDCA4D6PZ134220;

c) One 1989 Chevrolet One Ton Dually Pickup, VIN 2GCHK39N5K1148813;

d) One 1984 Southwind Motorhome, outside manufacturer's identification number H037226S0805.

On February 9, 2000, a Third Partial Judgment of Forfeiture was entered forfeiting the following described defendant vehicle to the United States of America for disposition

according to law:

One 1990 Chevrolet Z71 Silverado Pickup Truck, VIN No 2GCFC24K2L1138799.

The following parties were the only individuals with possible standing to file a claim to the default vehicles, and, therefore the only individuals to be served with process in this action, and were served as follows:

a) James Thronebury;

b) Linda Clay;

c) American States Preferred Insurance Company

d) Bank of Quapaw;

e) Dennis Earp;

f) Gary Briscoe.

Dennis Earp filed his Claim on July 1, 1997, and filed his Answer on July 1, 1997, wherein he claimed an interest in the following defendant vehicle:

a) 1989 GMC 1500 Pickup, VIN 1GTDC14Z3KZ510168.

Thereafter, on January 11, 2000, Dennis Earp filed his Withdrawal of Claim herein.

American States Preferred Insurance Company filed its Claim on July 16, 1997, and subsequently filed its answer on July 23, 1997, wherein it claimed an interest in the following defendant vehicles:

a) 1990 Chevrolet C1500 Pickup Truck, VIN #2GCFC29K9L1108689;

b) 1900 Chevrolet Pickup Truck VIN #1GCDC14ZXLE219689.

Thereafter, on December 29, 1999, American States Preferred Insurance Company filed its Withdrawal of Claim herein.

Bank of Quapaw filed its Claim and Answer on July 21, 1997, wherein it claimed an interest in the following defendant vehicles:

a) One 1989 Chevrolet One Ton Dually Pickup Truck, VIN 1GCHC34N5KE126233;

b) One 1992 Chevrolet One-Ton Pickup Truck, VIN 2GCHC39N1N1177632;

c) One 1983 Chevrolet Car Hauler, VIN 1GCHC33J0CS127341.

Thereafter, on January 13, 2000, Bank of Quapaw filed its Amended Answer and Disclaimer herein disclaiming interest in the defendant vehicles.

Gary Briscoe filed his Claim on June 30, 1997, and filed his Answer on July 21, 1997, wherein he claimed an interest in the following defendant vehicles:

a) One 1989 Chevrolet One Ton Dually Pickup Truck, VIN 1GCHC34N5KE126233;

b) 1968 Chevrolet Camaro Race Car, VIN #123378N428430.

Thereafter, on October 20, 1999, Gary Briscoe filed his Stipulation for Forfeiture herein wherein he stipulated to the forfeiture of the 1989 Chevrolet One Ton Dually Pickup Truck, VIN 1GCHC34N5K126233.

All persons and/or entities interested in the default vehicles were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this

action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the default vehicles, and no persons or entities have plead or otherwise defended in this suit as to said default vehicles and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the default vehicles and all persons and/or entities interested therein, save and except American States Preferred Insurance Company, for which a Withdrawal of Claim was filed herein, Bank of Quapaw, for which an Amended Answer and Disclaimer was filed herein, Dennis Earp, who filed his Withdrawal of Claim, and Gary Briscoe, who filed his Stipulation for Forfeiture herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicles and/or parts, trailer, and crusher was located, on October 30, November 6 and 13, 1997, and in the Miami News-Record, Miami, Oklahoma, the county where the defendant vehicles are located, on October 30, November 6 and 13, 1997. Proof of Publication was filed December 30, 1997.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described default vehicles:

a) 1990 Chevrolet C1500 Pickup Truck, VIN #2GCFC29K9L1108689;

b) 1989 Chevrolet One Ton Dually Pickup Truck, VIN #1GCHC34N5KE126233;

c) 1989 GMC 1500 Pickup Truck, VIN #1GTDC14Z3KZ510168;

d) 1900 Chevrolet Pickup Truck VIN #1GCDC14ZXLE219689;

e) 1992 Chevrolet One-Ton Pickup Truck, VIN #2GCHC39N1N1177632;

f) 1982 Chevrolet Car Hauler, VIN #1GCHC33J0CS127341;

be, and they hereby are, forfeited to the United States of America for disposition according to law.

Entered this 22 day of February, 2000.

TERRY C. KERN
Chief Judge of the United States District Court for the Northern District of Oklahoma

SUBMITTED BY:

CATHERINE J. DEPEW
Assistant United States Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL RAY HUDELSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 98-C-867-B(E)
	)	
ANNA MARIE COWDREY, in her individual capacity; RICK PHILLIPS, in his individual capacity,	)	
	)	
Defendants.	)	

ORDER

Comes on for consideration Attorney for Plaintiff's Motion and Affirmation In Support of Motion for Attorney Fees and the Court, following hearing, finds the same shall be granted as follows:

Plaintiff was the prevailing party as to defendant Rick Phillips ("Phillips") in the above-styled civil rights action and is therefore entitled to an award of reasonable attorney fees pursuant to 42 U.S.C.§1988 upon timely supporting application. Plaintiff seeks an award of $28,239.50.

Defendant Phillips objects to the attorney fee award on the grounds that the hourly rates charged by the three attorneys involved are too high given the level of experience and expertise, it is impermissible to charge a greater fee for in-court time as opposed to out-of-court time, the number of hours charged is excessive, and the description of work performed is inadequate and vague and includes unnecessary services, including preparation for a television interview, writing a letter to a credit agency in an attempt to avoid a lawsuit being filed against the Plaintiff, and medical discovery which was ultimately not presented due to financial inability of the Plaintiff to

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front deposition costs.

The Court finds that the attorneys should recover the same hourly rate for in-court time as for out-of-court time and the fees should be adjusted accordingly. The out-of-court rate for attorney Butler is consistent with rates charged by attorneys in this community having similar experience and background. However, the rates charged by the two associates are above those charged in this community for attorneys with similar background and experience. The Court notes however, that attorney Smith provided capable and valuable assistance to attorney Butler through the trial of this matter which justifies an hourly rate equal to that of attorney Jarvi, although attorney Jarvi had more years of experience. The Court agrees that the hourly rate for each associate should be reduced.

The Court finds no merit in Phillips' assertion that the time entries are too vague to allow the Court to ascertain what work was performed on behalf of Plaintiff against this Defendant. Further, the Court finds the specific entries to which Phillips objects were necessary to the proper preparation of the case, even though not ultimately made part of the trial record. In this regard, the Court notes the failure of Plaintiff's counsel to front medical deposition costs is not an ethical question as asserted by Plaintiff, but a matter of practical economics, which must be taken into account in any trial. The Court also concludes any statements made by Plaintiff in a television interview could be construed against him and possibly urged as admissions against interest and assistance of counsel was therefore justified for this time.

Defendant stipulated the hours and rate attributable to the legal assistant were reasonable and necessary and the Court agrees. Both parties presented expert testimony supporting their positions as to the remaining issues.

In calculating a reasonable attorney fee, the Court must first determine the number of hours reasonably spent by counsel for the party seeking the attorney fee. *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Robinson v. City of Edmond*, 160 F.3d 1274, 1284 (10th Cir. 1998); *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243 (10th Cir. 1993); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). This must then be multiplied by the reasonable hourly rate which the Court determines to be applicable based upon the experience and expertise of the attorneys involved.

Applying these standards to the case at bar, the Court concludes Plaintiff shall be awarded a fee in the amount of $23, 675.00. This is based upon the Court finding that 48 hours at a rate of $225 an hour is a reasonable number of hours and hourly rate for attorney Butler, 91 hours at a rate of $125 an hour is a reasonable number of hours and hourly rate for co-counsel Jarvi and Smith, and the stipulation of counsel that the legal assistant should receive $50 an hour for the 30 hours attributable to her.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT Plaintiff is awarded $23,675.00 in attorney fees in the above-styled action against Defendant Phillips, with interest to accrue at a rate of 6.287% from the date of this Order.

DONE THIS 22nd DAY OF FEBRUARY, 2000.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

THE SUM OF THIRTY THOUSAND SIX DOLLARS AND 25/100 ($30,006.25) IN UNITED STATES CURRENCY, et al.

Defendants.

Case No. 97-C-743-E

ORDER

Now before the Court is the Motion to Compel (Docket #14) of the claimant Joe Earl Rodgers, the Motion for the Court to Approve the Value of Properties and Dismiss Motion to Compel (Docket # 15) of the plaintiff United States, the Motion to Disclose (Docket # 16) of the claimant Joe Earl Rodgers, and the Motion for Order (Docket # 19) of the claimant Joe Earl Rodgers.

On February 16, 1991, local law enforcement officers in Oklahoma arrested Rodgers and seized numerous items. On March 8, 1991, federal officers attempted to serve Rodgers with an arrest warrant pursuant to a federal indictment, but were unable to do so, apparently because he left the country. The federal authorities then adopted for forfeiture: 1) $30,006.25 in United States currency; 2) $1,951.00 in United States currency; 3) a 1977 Chevrolet Corvette; 4) a 1979 Chevrolet Corvette; and 5) a 1984 Ford Econoline Van. When they did not receive any claims on these items the Drug Enforcement Administration (DEA) administratively forfeited them between May 10, 1991 and June 28, 1991. On March 11, 1997, the Court of Appeals issued an Order to vacate these forfeitures, United States v. Rodgers, 108 F.3d 1247 (10th Cir. 1997), finding that the attempts to give Rodgers

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actual notice of the forfeitures were not sufficient.

On May 30, 1997, the DEA commenced new administrative forfeiture proceedings against the same items, and, when Rodgers did make claim to the property, this civil forfeiture action was commenced on August 15, 1997. Subsequently, this Court found that the 1997 action was untimely and granted Rodgers' motion to dismiss. These motions followed, with Rodgers attempting to compel the return of his property, and to secure an award of interest on the proceeds gained from the sale of his property. The government filed a motion for the Court to approve the value of the properties as the amount received at public auction conducted by the United States Marshal's service. The government also objected to an award of interest. Rodgers did not object to the government's motion to set the value of the automobiles as the amount received at public auction. Thus, it is undisputed that Rodgers is entitled to:

1. $30,006.25 from currency that was administratively forfeited;

2. $1,951.00 from currency that was administratively forfeited;

3. $5,700.00 as the amount received at public auction from the 1979 Corvette;

4. $5,588.00 as the amount received at public auction from the 1977 Corvette; and

5. $2,030.00 as the amount received at public auction from the 1984 Econoline van.

The only issue in dispute is whether Rodgers is entitled to interest on the amounts owed him by the government. There is authority is support of both parties' positions on this issue. The Tenth Circuit has not addressed this issue. However, the Second and Eighth Circuits have held that interest is not available to the claimant because there is no express congressional consent to an award of interest, and therefore the government is immune from an interest award. United States v. $7,990.00 In U.S. Currency, 170 F.3d 843 (8th Cir. 1999), Ikelionwu v. United States, 150 F.3d 233 (2nd Cir.

1998). The Sixth and Ninth Circuits have held that interest is available, not as a general award of interest, but as part of the seized res, and as earnings to which the government is not entitled and of which it must disgorge itself. United States v. $277,000 In U.S. Currency, 69 F.3d 1491 (9th Cir. 1995), United States v. $515,060.42 In U.S. Currency, 152 F.3d 491 (6th Cir. 1998). The Court finds the reasoning of the Second and Eighth Circuits more compelling. Regardless of how the payment is characterized, it is still an award of interest from which the government is immune.

The Motion to Compel (Docket #14) is **DENIED AS MOOT**, the Motion for the Court to Approve the Value of Properties and Dismiss Motion to Compel (Docket # 15) is **GRANTED,** the Motion to Disclose (Docket # 16) is **DENIED** , and the Motion for Order (Docket # 19) is **DENIED**. The government is directed to return to the claimant the amount described above: $30,006.25 from currency that was administratively forfeited, $1,951.00 from currency that was administratively forfeited, $5,700.00 as the amount received at public auction from the 1979 Corvette, $5,588.00 as the amount received at public auction from the 1977 Corvette, and $2,030.00 as the amount received at public auction from the 1984 Econoline van.

IT IS SO ORDERED THIS 18th DAY OF FEBRUARY, 2000.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Orig.

FILED
FEB 10 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SCOTT CROSSLAND

Plaintiff,

VS.

PROFESSIONAL INVESTMENTS, INC. AND AMF BOWLING CENTERS,

Defendants.

CASE NO.: 99CV0626BU(M)

ENTERED ON DOCKET
DATE FEB 23 2000

NOTICE OF DISMISSAL WITHOUT PREJUDICE OF DEFENDANT AMF BOWLING CENTERS CROSS CLAIM AGAINST CO-DEFENDANT

COMES NOW Defendant AMF Bowling Centers and pursuant to F.R.C.P. 41.A.1. hereby dismisses without prejudice its Cross Claim against Co-Defendant herein.

Respectfully submitted,

WAGNER, STUART & CANNON, P.L.L.C.

SCOTT D. CANNON, OBA #10755
902 South Boulder
Tulsa, OK 74119-2034
(918) 582-4483
Attorney for Defendant, AMF Bowling Centers

CERTIFICATE OF FACSIMILE//MAILING

I hereby certify that a true and correct copy of the above and foregoing was __faxed/X mailed to the following attorney(s) of record with sufficient postage thereon this 10 day of February, 2000.

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Jeff Nix
Attorney at Law
601 South Boulder, Suite 610
Tulsa, OK 74119

Attorney for Plaintiff

Scott D. Cannon

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FORREST WADE SWAN and LORETTA SWAN,	)	ENTERED ON DOCKET
	)	DATE FEB 23 2000
Plaintiffs,	)	
v.	)	**Case No. 99-CV-702-K (J)**
UNITED STATES OF AMERICA, substituted for DOUGLAS W. WHITMIRE,	)	**F I L E D**
	)	FEB 22 2000
Defendant.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

Before the Court is Defendant's motion to dismiss for lack of subject matter jurisdiction. Defendant contends that the Secretary of Labor has exclusive jurisdiction over any of Plaintiffs' action for injuries suffered by Forrest Swan in the course of his government employment.

Plaintiffs allege that Douglas Whitmire negligently caused an automobile crash in which Mr. Swan was injured. Mrs. Swan also seeks damages for loss of services, society, companionship, and consortium resulting from Mr. Swan's injuries. On November 19, 1999, the Court granted the United States' motion to substitute as Defendant for Mr. Whitmire, after the Government demonstrated that he was acting within the scope of his employment at the time of the accident. Mr. Swan, furthermore, was acting within the scope of *his*

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employment with the United States Postal Service ("USPS") at the time of the accident. Based on this information, the Government seeks to dismiss Plaintiffs' action, based on the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101 *et seq.*

The Court lacks jurisdiction over Plaintiffs' claims, because their exclusive remedy lies with the Secretary of Labor. Under the FECA, federal employees injured while performing their governmental duties are compensated by the United States. *See* 5 U.S.C. § 8102(a). This compensation is the employee's exclusive remedy. *See* 5 U.S.C. § 8116(c). The employee and any other person, including a spouse, who would otherwise be entitled to recover damages from the United States due to the injury, are barred from seeking damages against the United States in any civil action or under a Federal tort claims statute. *See id.* On such statute is the Federal Tort Claims Act, which waives the United States' sovereign immunity for liability for torts committed by its employees in the scope of their employment. *See* 28 U.S.C. § 1346(b). An attorney for the USPS has certified, and Plaintiffs have admitted, that Mr. Swan was acting within the scope of his employment at the time of the accident. Therefore, Plaintiffs remedies are limited to those provided under the FECA, and this Court lacks subject matter jurisdiction over their claims.

IT IS THEREFORE ORDERED that the Motion to Dismiss of the United States of America (# 9) is GRANTED and the above-captioned case is dismissed in its entirely, including any counterclaims filed prior to the substitution of the United States of America.

ORDERED this 22 day of February, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PEGGY J. LEOPARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 99-CV-462-K (J)**
	)	
NEENA INN, INC.,	)	
	)	
Defendant.	)	

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by Settlement Judge Nancy Gourley on February 11, 2000, that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED THIS 22 DAY OF FEBRUARY, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHEILA BARNES, SSN: 451-29-6897, Plaintiff, v. KENNETH S. APFEL, Commissioner of the Social Security Administration, Defendant.	)	CASE NO. 97-CV-514-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 22nd day of Feb, 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 22 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEONARD McDANIEL,

Plaintiff,

vs.

STATE OF OKLAHOMA, ex rel., the OFFICE OF JUVENILE AFFAIRS, and L.E. RADER CENTER,

Defendants.

Case No. 99-CV-40-BU(M)

ENTERED ON DOCKET
DATE FEB 23 2000

ORDER

In light of the representations of Plaintiff's counsel and the agreement of the parties on the record, the Court hereby **DISMISSES WITHOUT PREJUDICE** Plaintiff's action against Defendant, L.E. Rader Center.

ENTERED THIS 22nd day of February, 2000.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 22 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FARMERS INSURANCE COMPANY, INC.,

Plaintiff,

-vs-

CHRISTINA NAVECK, GABRIEL BERNAL and ARTURO BERNAL,

Defendants.

No. 99-CV-0460 BU(J)

ENTERED ON DOCKET
DATE FEB 23 2000

ORDER OF DISMISSAL

NOW on this 22nd day of February, 2000, upon the written Application of the parties for a Dismissal With Prejudice of the Complaint and all causes of action, the Court having examined said Application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court, being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said Application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendants be, and the same hereby are dismissed with prejudice to any future action.

Michael Burrage

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHRISTI CRAFTON, **SSN: 446-88-0552**	)	
Plaintiff,	)	
v.	)	**Case No. 99-CV-0152-H (E)**
KENNETH S. APFEL, Commissioner, **Social Security Administration,**	)	ENTERED ON DOCKET FEB 22 2000 DATE _____
Defendant.	)	

REPORT AND RECOMMENDATION

Claimant, Christi Crafton, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of Social Security ("Commissioner") denying claimant's application for disability benefits under the Social Security Act. By minute order dated February 25, 1999, this case was referred to the undersigned for all further proceedings in accordance with her jurisdiction pursuant to the Federal Rules of Civil Procedure. For the reasons discussed below, the undersigned recommends that the Commissioner's decision be **REVERSED AND REMANDED** for further proceedings consistent with this Report and Recommendation.

Social Security Law and Standard of Review

Disability under the Social Security Act is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if her "physical or mental impairment or impairments are of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work in the national economy . . . ." Id. § 423(d)(2)(A).

Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. §§ 404.1520, 416.920.[1]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

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[1] Step one requires claimant to establish that she is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her ability to do basic work activities. See id. §§ 404.1521, 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments "medically equivalent" to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that she does not retain the residual functional capacity (RFC) to perform her past relevant work. If claimant's step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account her age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

Procedural History

On August 20, 1992, claimant protectively filed for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Her application was denied on November 13, 1992. On October 19, 1993, claimant protectively filed a second application for Supplemental Security Income benefits. The second application was denied on December 20, 1993, and claimant was notified by letter dated December 22, 1993. On September 28, 1995, claimant protectively filed a third application for Supplemental Security Income benefits, which was denied initially (December 28, 1995) and on reconsideration (March 1, 1996). Claimant filed a request for hearing on March 27, 1996.

A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held March 20, 1997, in Miami, Oklahoma. By decision dated April 10, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On July 8, 1998, the Appeals Council denied claimant's request for review of the ALJ's findings. However, claimant submitted additional evidence and arguments, which the Appeals Council considered. On January 8, 1999, the Appeals Council vacated its prior decision, but again denied claimant's request for review of the ALJ's findings. Claimant again submitted additional evidence and arguments, and, on February 12, 1999, the Appeals Council again vacated its prior order but denied claimant's request for review. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 416.1484(b)(2).

Claimant's Background

Claimant was born on August 10, 1974, and was 22 years old at the time of the ALJ's decision. She has a high school diploma through special education courses. Claimant worked as a

housekeeper in a nursing home for a few days in 1993. Claimant alleges an inability to work beginning January 1, 1980, due to mental retardation, seizures, headaches, asthma, and abdominal pain.

Decision of the Administrative Law Judge

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform medium work activity involving simple, repetitive tasks, with seizure precautions to include not working at unprotected heights or around dangerous machinery. The ALJ determined that claimant could not perform her past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that she could perform, based on her RFC, age, education, and work experience. The ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant asserts as error that:

1. the ALJ erred in his decision by using a "pick and choose" method to evaluate the evidence, selecting only the evidence which would support his denial, thereby ignoring the record as a whole and denying the claimant a fair and just hearing;
2. the ALJ erred in his presentation of claimant's educational background, whereby he did not show claimant's high school education was through special education classes;
3. the ALJ failed to properly evaluate the claimant's mental impairments, with such failure "carrying through" his hypothetical questioning to the vocational expert;

4. the ALJ failed in his assessment of claimant's credibility where he found her testimony credible only to the extent that it is consistent with the performance of medium work activity; and

5. the ALJ erred when he did not provide a proper rationale in accordance with SSR 96-7p for his evaluation of claimant's pain and other "maladies" resulting in a decision that is not supported by substantial evidence.

(Memo Br., Docket # 6, at 2.) Claimant specifically requests that her prior applications be reopened and considered in accordance with 20 C.F.R. § 416.1488(c) and SSR 91-5p, due to her mental impairments. The Commissioner argues that the ALJ's decision not to reopen claimant's prior applications is not reviewable, that substantial evidence supports the ALJ's finding that claimant was not disabled, and that the ALJ properly found that claimant was capable of performing other work.

Reopening

The Social Security Administration regulations govern the reopening of prior determinations. The relevant portions clearly indicate that reopening is discretionary. See 20 C.F.R. §§ 416.1487, 416.1488. The ALJ found no basis to reopen the prior determination. (R. 22) Therefore, he considered the relevant period to be from December 23, 1993 (the day following the last prior determination) through April 10, 1997 (the date of his decision) for purposes of eligibility under Title XVI of the Social Security Act. The ALJ's finding is not reviewable by this Court absent a valid Constitutional claim. Califano v. Sanders, 430 U.S. 99, 107-08 (1977); Nelson v. Sec'y of Health & Human Servs., 927 F.2d 1109, 1111 (10th Cir. 1990). Claimant has failed to demonstrate that the ALJ's exercise of regulatory discretion violated claimant's Constitutional rights. The decision of the ALJ not to reopen is, therefore, not reviewable by the Court.

Evaluation of the Evidence

The ALJ is required to "evaluate every medical opinion" he receives, 20 C.F.R. § 416.927(d), and to "consider all relevant medical evidence of record in reaching a conclusion as to disability," Baker v. Bowen, 886 F.2d 289, 291 (10th Cir. 1989), even though he is not required to discuss every piece of evidence. "Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996) (citations omitted). Claimant argues that the ALJ improperly disregarded her testimony regarding her debilitating headaches and her concomitant need for lengthy rest periods. (R. 55-57)

The ALJ noted the testimony of claimant and her mother regarding the severity of claimant's headaches, but chose not to accord significant weight to that testimony for several reasons. First, claimant's mother testified that claimant sleeps two or three times during the day for an hour or two and wakes up at night several times and wanders around the house. (R. 27, 29; see R. 69-70) In addition, doctors prescribed medication to relieve claimant's discomfort associated with claimant's headaches. (R. 28; see, e.g. R. 346) The ALJ also relied upon progress notes from the Miami Indian Clinic, dated October 25, 1995, which indicate that doctors there "reassured" claimant's mother that claimant's CT scan was normal, that claimant's headaches were either due to increased seizure activity as a result of a change in medication for her seizures or the headaches were migraine, and that they would "press on to get it controlled." (R. 29, citing to R. 346)

Unfortunately, the progress notes after October 25, 1995 show that they did not "get it controlled." Claimant's treating physician even referred claimant to Neurological Associates of Tulsa, Inc., for an evaluation. On July 31, 1996, Harvey J. Blumenthal, M.D. wrote:

> Sheila was especially concerned about her daughter's headaches and Christi and Sheila reported the patient has right orbital headaches, "like someone is sticking a sharp knife into my head" lasting three hours. Tylenol sometimes helps. The headaches began about a year ago and usually last an entire day. These occur two or three times a week and Christi becomes disabled, nauseated and dizzy. She does not vomit and denied photopsia. Sometimes, the throbbing headache may occur on the left side. The patient and her mother have not observed any specific triggers. Christi's maternal grandmother was diagnosed as having migraine.

(R. 511) Dr. Blumenthal recommended that claimant's treating physician "try" Methergine for claimant's migraine headaches.

Reports following that examination demonstrate that claimant's headaches did not cease. Prior to and after the date of the ALJ's decision, claimant continued to complain of headaches that doctors characterized as "chronic," "daily," "persistent," and "migraine" or "muscle tension." (R. 343, 345, 486, 490, 491, 503, 511-12, 563, 564, 565, 566, 599, 603, 606) Claimant's mother also testified that the headaches were debilitating and persistent, and doctors still had not determined what caused them. (R. 67-69) The ALJ and the Appeals Council failed to discuss the uncontroverted and significantly probative evidence they rejected. Thus, the finding that claimant was not disabled is not supported by substantial evidence.

Treating Physician

Claimant also challenges the ALJ's failure to accord appropriate weight to the opinion of claimant's treating physician, Paul K. Fuhrmeister, M.D. Dr. Fuhrmeister admitted that he had not performed mental status or intelligence testing on claimant since he began treating her for a seizure disorder and minor illnesses in May 1994. (R. 314) Nonetheless, he commented that he had become familiar with her intellectual capacities. He reported that she had trouble answering questions intelligently, and she showed deficiencies in abstract thought, concentration, goal-directed behavior,

and judgment. He opined that she had mild mental retardation, and he did not believe that she was "capable of handling her own affairs in the areas of finance, occupation or living arrangements." (Id.)

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments, including the claimant's symptoms, diagnosis and prognosis, what claimant can do despite the claimant's impairment, and any physical or mental restrictions. 20 C.F.R. § 416.927(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well-supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. § 416.927(d)(2). A treating physician may also proffer an opinion that a claimant is totally disabled. However, such an opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. Id. § 416.927(e)(2).

Tenth Circuit law requires that substantial weight must be given to the opinion of a treating physician unless good cause is shown for rejecting it. Goatcher v. United States Dep't. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted). A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

The ALJ discounted Dr. Fuhrmeister's opinion because he deemed the opinion conclusory and unsupported by other opinions, medical evidence, diagnostic testing, laboratory reports, or

clinical findings. (R. 29) This assessment ignores the evidence in the record by psychologists who tested claimant's mental status and intelligence. As claimant points out, Herndon Snider, Ph.D., examined claimant on behalf of the Commissioner in December 1995, and found that claimant "interacts in a somewhat immature fashion." (R. 327) Dr. Snider reported that claimant had a Verbal IQ score of 74; a Performance IQ score of 85; and a Full Scale IQ score of 77. (R. 327-28) He indicated that she had greatest difficulties on tasks requiring judgment, arithmetic computations, and specific items of information. He assessed her intellectual level as "in the Borderline range" and stated: "[i]t would be advisable that any payment be supervised by the family as she does not appear to be capable of managing her own funds." (R. 328)

Dr. Snider's evaluation concurs with that of Randy Jarman, Ph.D., and Jim Hulse, MHR, who evaluated claimant in October 1995. Hulse and Jarman reported that claimant achieved a Verbal IQ score of 71, a Performance IQ score of 87, and a Full-Scale IQ score of 76, "placing her in the Borderline intellectual range of achievement." (R. 319) She performed at a fourth or fifth grade level. (Id.) Their diagnostic impression included "Borderline Intellectual Functioning," which they equated with "Mild Mental Retardation" (R. 316) They also reported that she had ongoing interpersonal conflict with her family members and an inability to maintain herself in the community, as well as occupational, housing and economic problems. Her score on the Global Assessment of Functioning (GAF) scale was 60/60. A score of 51-60 indicates moderate symptoms or moderate difficulty in social, occupational, or school functioning. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 25-30 (4th ed.1994).

Given this evidence, the ALJ has not shown good cause for rejecting the opinion of claimant's treating physician. The ALJ set forth the findings in the Snider and Hulse/Jarman reports,

but he did not discuss them or otherwise indicate how they supported or failed to support his conclusions. The ALJ did not mention them in connection with his assessment of claimant's mental impairment or otherwise compare them with Dr. Fuhrmeister's opinion. Since the Snider and Hulse/Jarman reports clearly support Dr. Fuhrmeister's opinion, the ALJ erred in not giving it controlling, or at least substantial, weight.

Educational Background

Claimant's diminished intellectual capacity is reflected in her school records. (R. 166-213) Claimant contends that the ALJ focused on the fact that claimant had a high school diploma and ignored the fact that she achieved a high school degree by completing special education classes. (Memo. Br., Docket # 6, at 2, 4) While it is true that claimant's cognitive functioning was at a 10-11 year old level when she was 19 years old, it is not true that the ALJ disregarded this fact. He explicitly acknowledged her testimony that she had attended special education classes since the third grade (R. 28), and his question to the vocational expert explicitly mentioned that claimant was in special education classes. (R. 74) He also found that she was mentally retarded, but he did not deem that impairment severe enough to interfere more than minimally with her ability to perform work-related activities or to meet or equal the severity of any listing in the Listing of Impairments (20 C.F.R. Pt. 404, Subpt. P., App. 1). (R. 24, 31)

The ALJ did use the fact that claimant had a high school education to find that, under Rule 203.28 of the Medical-Vocational Guidelines (the "Grids"), 20 C.F.R. part 404, Subpt. P, App. 2, "a finding of not disabled is appropriate," but he did not rely exclusively on the Grids. Instead, he asked the vocational expert if there were other jobs in the regional or national economy that the claimant could perform. Claimant's argument that the ALJ did not show that claimant attended

special education classes is misplaced. It is only relevant to the extent it reflects the ALJ's improper evaluation of claimant's mental impairment, as discussed next.

Evaluating Mental Impairments

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. § 416.920a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

The ALJ followed this procedure, in part, but the PRT form does not set forth any conclusions. Instead, the ALJ merely recited the IQ scores of claimant as an indication of claimant's mental retardation. (R. 34-35) The ALJ then summarily concluded in his opinion that claimant can perform medium work involving simple, repetitive-type work activity. (R. 26, 31) There is no explanation of the relationship between claimant's IQ scores, as expressed on the PRT form, and the ALJ's conclusion regarding her RFC.[2] The ALJ's failure to relate his conclusions to the evidence

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[2] The ALJ may have omitted the "Rating of Impairment Severity" that usually accompanies a PRT form (see R. 94, 115), or the rating may have been inadvertently omitted from the record. The absence of a Rating of Impairment Severity completed by the ALJ suggests that he may not have fully considered or properly assessed the degree of functional limitation present as a result of claimant's mental retardation.

is reversible error. See Winfrey, 92 F.3d at 1024. The ALJ failed to properly assess the nature and extent of claimant's mental limitations.

Vocational Expert Testimony

Claimant argues that the ALJ's failure to properly evaluate the claimant's mental impairments "carried through" in his hypothetical questioning to the vocational expert. (Memo. Br., Docket # 6, at 2) The ALJ requested that the vocational expert assume an individual who was in special education classes and had a marginal ability to read, write and use numbers. (R. 74) His hypothetical question also asked the vocational expert to assume that the individual had been diagnosed as having mild mental retardation but could perform simple tasks. The ALJ stated that "[s]he could interact with others for work related purposes, supervisors and coworkers. She can adapt to a work situation -- okay -- as indicated, simple routine type tasks." (R. 75)

In forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Shepherd v. Apfel, 184 F.3d 1196, 1203 (10th Cir. 1999); Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995). However, "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the [Commissioner's] decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). As set forth above, the ALJ failed to properly assess claimant's mental impairments. Thus, the assumptions he asked the vocational expert were not based on substantial evidence, and the vocational expert's testimony, in turn, cannot constitute substantial evidence to support his decision.

Pain and Credibility Assessment

Finally, claimant argues that the ALJ failed to properly evaluate claimant's subjective complaints of pain and her credibility. Claimant specifically points out that she suffered from frequent abdominal pain in addition to her headaches, as discussed above. The ALJ found that the abdominal pain, like her headaches, were not sufficiently severe to preclude her from engaging in all types of work activity. (R. 27-29) With regard to her abdominal pain, the ALJ's analysis included the following statements: "The claimant's frequent episodes of right-sided abdominal pain has [sic] been evaluated and it was determined that her symptoms were not typical of any disease (Exhibit 47, page 7). The claimant was to be referred to the surgical clinic for further evaluation." (R. 29)

Exhibit 47, page 7 is a page from the progress notes, dated December 18, 1995, of the Miami Indian Health Center. It indicates that claimant had been prescribed medication for endometriosis. (R. 336) The medication helped, but the pain returned. Claimant then had an appendectomy and that helped, but the pain returned again. The doctor ruled out several causes as the source of claimant's abdominal pain, and apparently had a "long talk" with claimant to explain that her "symptoms [were] not typical of any disease." (Id.) He questioned whether "adhesions" might be the source of her chronic, recurrent pain. (Id.)

The framework for the proper analysis of evidence of allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires consideration of:

> (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether, considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling.

Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992); accord Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995). The factors that an ALJ should consider when determining the credibility of subjective complaints of pain include, but are not limited to, "the levels of medication and their effectiveness, the extensiveness of attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence." Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) (quoting Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988)); accord Luna, 834 F.2d at 165-66 (citations omitted).

The ALJ considered claimant's subjective complaints of disabling pain. He specifically referenced the parameters and the criteria set forth in 20 C.F.R. § 416.929 and Social Security Ruling 96-7p. He analyzed many, but not all, of the relevant factors to determine the weight to be given claimant's subjective allegations of pain, and, as required by Kepler, the ALJ made express findings as to the credibility of claimant's objective complaints of disabling pain, with an explanation of why specific evidence led to the conclusion that claimant's subjective complaints were not fully credible. (R. 26-29) However, the evidence he cites for his conclusion regarding her allegations of abdominal pain does not support his conclusion. The fact that her symptoms were "not typical of any disease" (R. 29) does not ipso facto mean that she could perform medium work or that those symptoms were not disabling.

Further evaluation indicated, before the ALJ made his decision in April 1997, that she continued to have chronic abdominal pain. (See R. 483, 485, 496, 497, 499) After the ALJ's decision, claimant submitted records to the Appeals Council which demonstrate that she had exploratory surgery in an effort to determine the cause of her consistent, continual complaints of abdominal pain. (R. 577) Doctors initially thought she might have had a hernia in her appendectomy scar. (R. 579) The October 1997 surgery revealed evidence of endometriosis, and her doctor prescribed medication to treat it. (R. 577) The medication did not alleviate the pain, and plaintiff had surgery again in May 1998. The surgeon found that she had an "entrapped nerve" that had formed after her appendectomy in 1994. (R. 557) The surgeon divided the nerve (R. 557), and claimant did well post-operatively (R. 554), but the pain returned a couple of months later (R. 553). A pelvic ultrasound revealed no cysts or masses, but the record does not indicate that the claimant's pain abated. (R. 551) The Appeals Council, like the ALJ, failed to discuss uncontroverted and significantly probative evidence.

Credibility determinations made by an ALJ are generally entitled to great deference. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health and Human Servs, 898 F.2d 774, 777 (10th Cir. 1990); Social Security Ruling 82-59, 1982 WL 31384. Here, the ALJ's credibility determination was not supported by substantial evidence. In fact, the ALJ's treatment of claimant's allegations of abdominal pain ignores substantial evidence of abdominal pain that may have affected claimant's RFC. Since the ALJ failed to properly analyze

evidence of allegedly disabling pain, his decision is not supported by substantial evidence and should be reversed.

Conclusion

Based upon the foregoing, the undersigned recommends that the decision of the Commissioner denying disability benefits to claimant be **REVERSED AND REMANDED** for further proceedings consistent with this Report and Recommendation.

Objections

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Judge.** See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999).

DATED this 18th day of February, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 22nd Day of February, 2000.

Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

INGE HARRINGTON, o/b/o DENNY F. HARRINGTON, deceased, SSN: 432-62-1767,	)	
Substituted Party Plaintiff,	)	
v.	)	**Case No. 98-CV-0115-EA**
KENNETH S. APFEL, Commissioner, Social Security Administration,	)	
Defendant.	)	

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to plaintiff has been entered. Judgment for the defendant and against the plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 18th day of February, 2000.

Claire V. Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

INGE HARRINGTON, o/b/o DENNY F. HARRINGTON, deceased, SSN: 432-62-1767,	)	
Substituted Party Plaintiff,	)	
v.	)	**Case No. 98-CV-0115-EA**
KENNETH S. APFEL, Commissioner, Social Security Administration,	)	
Defendant.	)	

ORDER

Substituted plaintiff, Inge Harrington, on behalf of claimant, Denny F. Harrington, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act. In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

Social Security Law And Standard of Review

Disability under the Social Security Act is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any

other kind of substantial gainful work in the national economy . . . ." Id. § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. §§ 404.1520, 416.920.[1]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence

[1] Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See id. §§ 404.1521, 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments "medically equivalent" to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant's step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account his age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

Procedural History

On August 23, 1995, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge Leslie J. Hauger (ALJ) was held February 3, 1997, in Tulsa, Oklahoma. By decision dated February 11, 1997, the ALJ found that claimant was not disabled on or before September 30, 1990 (the date claimant was last insured for disability benefits under Title II). On December 16, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.981.

Claimant's Background

Claimant was born on October 16, 1937, and was 52 years old as of the last date on which he was insured for benefits under Title II. See SSR 82-62 and SSR 83-10. He had an eighth grade education and worked as an auto production line worker and a painter's helper. His insured status for Title II disability insurance benefits expired on September 30, 1990. Claimant alleged an inability to work beginning August 15, 1984, due to chronic obstructive pulmonary disease (COPD), advanced degenerative right knee arthritis, and pain. In his initial application, claimant stated that his disability was due to emphysema and a deteriorating joint of the right knee. (R. 56)

Claimant died on October 10, 1999, while his claim was pending in this Court. The cause of claimant's death was anteriosclerotic cardiovascular disease. (Docket # 11, at 2) His surviving

spouse filed a suggestion of death upon the record and a motion for substitution of party. The motion was unopposed, and the Court granted the motion on February 15, 2000.

Decision of the Administrative Law Judge

The ALJ made his decision at the second step of the sequential evaluation process. He found that claimant did not have any impairment or impairments which significantly limited his ability to perform basic work-related activities, and therefore, claimant did not have a severe impairment. He concluded that claimant was not disabled on or before September 30, 1990, the date claimant's insurance expired.

Review

Claimant asserted that the ALJ erroneously held that there was insufficient evidence of the claimant's disability. At step two of the sequential evaluation process, an ALJ may find that a claimant does not have a severe impairment and therefore is not disabled, if the claimant does not have any impairment or combination of impairments which significantly limits his physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c); 404.1521. A claimant is required only to make a "de minimus showing" at this step. Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988). However, the claimant must show more than the mere presence of a condition or ailment. Hinkle v. Apfel, 132 F.3d 1349, 1353 (10th Cir. 1997) (citing Bowen v. Yuckert, 482 U.S. 137, 153 (1987).

Claimant did not show more than the mere presence of a condition or ailment prior to September 30, 1990. There is simply no evidence demonstrating that claimant's knee problems were severe prior to the date of claimant last insured status, and there is no objective medical evidence at all of claimant's emphysema or COPD before 1991. The relevant analysis is whether claimant was

actually disabled prior to September 30, 1990. See Potter v. Secretary of Health & Human Servs., 905 F.2d 1346, 1348-49 (10th Cir. 1990).

Claimant provided evidence that he injured his knee in an altercation with his brother some 20 years before he had knee surgery in 1983. (R. 88, 91) His surgeon and treating physician, James L. Griffin, M.D., diagnosed him post-operatively as having a bucket handle tear of lateral meniscus of right knee, degenerative joint disease of right knee, and chronic torn anterior cruciate ligament, right knee. (R. 88) In follow-up appointments, claimant demonstrated full extension and good strength in his leg, and his physical therapist noted that he could lift 15 to 17.5 pounds with his knee. (R. 91) Claimant told Dr. Griffin that his knee had "very much improved" and Dr. Griffin noted that claimant had full range of motion. He did not complain of any instability in his knee, and Dr. Griffin released him to work on September 28, 1983. (R. 91) Dr. Griffin then treated and operated on claimant for "chronic olecranon bursitis right elbow"(R. 89-91), but claimant did not allege that any problems with his elbow are disabling.

While a treating physician may provide a retrospective diagnosis of a claimant's condition, "[a] retrospective diagnosis without evidence of actual disability is insufficient." Potter, 905 F.2d at 1348-49. Claimant's treating physician never opined that claimant's condition was disabling prior to September 30, 1990. In fact, he released claimant to return to work. (R. 91) Claimant stated on the vocational report he submitted in 1995 that he had problems with his right knee after his last job in 1985, and by 1989 his knee problems kept him from doing any hard work, like lifting and climbing, or manual labor. He stated that, by 1993, his knee had deteriorated to the point where he could no longer stand on it for any period of time. (R. 69) On August 22, 1995, claimant was

diagnosed with advanced degenerative arthritis of the right knee, which would most likely require joint replacement surgery within the next year or two after that date. (R. 123)

Claimant testified that it was not until "'90, '91" that his knee "bothered" him, although it has "always bothered me but not to the point I was aware of it all the time." (R. 159) Yet he did not have it checked by a doctor about it until 1995. (Id.) At the hearing, he testified that his knee injury resulted "from just playing ball when I was about 20" and "over the period of years they used a lot of cortisone in it and I think the cortisone maybe is what deteriorated my bones." (Id.) In response to the ALJ's question: "[H]ow often does it bother you?", claimant stated "When I over exercise it." (Id.) He rated his pain, when he had it, at a 5 or 6 on a scale of 0-10. He said that the pain was not severe but constant; yet, at the time of the hearing, his pain was 0. (R. 160)

Claimant alleged that emphysema was his primary disability as of the hearing date in 1997. (R. 157) However, he testified that his emphysema did not begin to bother him until "'90, '91" when doctors told him he was "10 years advanced." (R. 164) Claimant also stated that his emphysema had been a problem since he was 30 years of age. (R. 157) However, the medical evidence indicates that he did not present to a doctor until March 26, 1991, when he thought he had "walking pneumonia." (R. 134) He was diagnosed with probable pneumonia, COPD due to smoking, and chronic rhinitis due to smoking. His doctor prescribed medication for him and advised him to stop smoking. (Id.) On April 16, 1991, his doctor indicated that he had "resolved clinical pneumonia," but claimant still had COPD secondary to smoking. (R. 133) On November 7, 1991, chest x-ray findings suggested COPD. (R. 136)

In March 1993, claimant returned to his physician for refills of his medication. A report of that visit indicates that claimant said he felt in good shape and had no complaints. He had not

stopped smoking. (R. 131) In August 1995, claimant presented for diagnosis and treatment of his emphysema. (R. 109-21) Tests were again consistent with COPD, and claimant was prescribed an inhaler. (R. 115, 108)

Claimant indicated at the hearing that, when he awoke in the morning, he coughed for three to four minutes, spit up phlegm, and used an inhaler. (R. 157-58) His daily activities involved driving, cleaning the house, mowing the lawn, vacuuming, laundry, cooking, shopping, gardening, playing Bingo. (R. 155, 160-62, 165-68) He testified that he built two brooder houses and painted two houses in 1991. (R. 163) He was able to take care of himself and his mother-in-law when his wife was in the hospital. (R. 160) Claimant's own testimony regarding his activities undermine his claim that he was disabled prior to September 30, 1990, and that his disability continued afterwards. Claimant failed to show, by his testimony or the medical evidence presented, that he became disabled prior to the expiration of his insured status.

Conclusion

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 18th day of February, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD A. JEAN,
SSN: 029-30-5798,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 99-CV-169-M

ENTERED ON DOCKET

DATE FEB 22 2000

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 18th day of Feb., 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

10

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICHARD A. JEAN,
029-30-5798

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 99-CV-169-M

ORDER

Plaintiff, Richard A. Jean, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

[1] Plaintiff's July 22, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held August 29, 1996. By decision dated December 18, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on January 8, 1999. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born April 17, 1941, and was 55 years old at the time of the hearing. He has an 8th grade education and formerly worked as a security guard. He claims to be unable to work as a result of pain and foot swelling, blurred vision, anger, and inability to remember. The ALJ determined that Plaintiff is capable of performing his past relevant work as a security guard. The case was thus decided at step four of the five-step evaluative sequence for determining whether Plaintiff is disabled.

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) erroneously concluded that he does not have a severe mental impairment; and (2) the ALJ failed to make specific findings concerning the requirements of his past relevant work as required by Social Security Ruling 96-8p and *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996). The court finds that the case must be reversed and remanded.

A psychological consultative evaluation was performed in April 1996 by John W. Hickman, Ph.D. Testing demonstrated that Plaintiff had a verbal IQ of 74, a

performance IQ of 84, and a full scale IQ of 78. [R. 264]. Among other findings, Dr. Hickman found that Plaintiff was mildly impaired in his understanding of the meanings of words; and was moderately impaired in the amount of information he could retrieve about the world around him. [R. 265]. With regard to the results of the Minnesota Multiphasic Personality Inventory (MMPI), Dr. Hickman found that Plaintiff "had a marked tendency to over report his difficulties to the degree that the validity of his profile is very questionable." *Id.* Despite the questionable validity of the MMPI scores, Dr. Hickman stated that Plaintiff "may be able to do some sort of repetitive work . . . he may have problems coping with the social aspects of most job settings. . . . His intellectual, attentional, and memory functioning may improve . . . after successful treatment." [R. 266]. A Medical Assessment of Ability to do Work-Related Activities (Mental) form was completed. Dr. Hickman found that Plaintiff had seriously limited but not precluded abilities in the following areas: follow work rules; use judgment; deal with work stresses; function independently; understand, remember, and carry out detailed but not complex job instructions; behave in an emotionally stable manner; and relate predictably in social situations. [R. 267-68]. Plaintiff was found to have no ability to understand, remember, and carry out complex job instructions, and a limited but satisfactory ability to understand, remember and carry out simple job instructions. *Id.*

The ALJ noted the "psychological evaluator's expectation that with treatment the claimant's ability to function in multiple areas would improve, leaving the Administrative Law Judge to conclude that with recommended treatment the claimant

would not be so limited as was identified to be in the [consultative] assessment." [R. 27]. The ALJ found that despite Plaintiff's capacity to only perform in the upper part of the borderline range of mental ability as signified by his IQ scores, Plaintiff "has not lost the mental ability to do basic work activities, including understanding, carrying out, and remembering simple instructions, using judgment, responding appropriately to supervision, coworkers and usual work situations, and dealing with changes in a routine work setting." *Id.*

The ALJ concluded "that to the extent claimant is subject to limitations due to such range of capability, the record does not suggest any event of recent occurrence which would have precipitated such limitations, suggesting, therefore, as discussed below at step four, no change in the range of the claimant's capabilities when performing work in the past. In such senses [sic] it is determined the claimant's intellectual limitations are not severe." *Id.*

The ALJ misinterpreted the psychological evaluator's findings. The ALJ interpreted the psychological evaluator as saying that he expected Plaintiff's ability to function to improve with treatment. What the evaluator actually said was: "His intellectual, attentional, and memory functioning may improve, as well his social functioning after successful treatment." [R. 266; emphasis supplied]. Rather than indicating an expectation that Plaintiff would improve, the evaluator's statement is more appropriately seen as evincing the possibility that Plaintiff might improve. The court concludes that the ALJ's statement that Plaintiff was not as limited as the psychological evaluator indicated is not supported by substantial evidence. Therefore

limitations related to Plaintiff's intellectual, attentional, and memory functioning should have been included in Plaintiff's residual functional capacity.

The ALJ's failure to included such mental limitations tainted his step-four analysis which contained no inquiry into the mental demands of Plaintiff's former work as a security guard as required by SSR 82-62 and *Winfrey v. Chater*, 92 F.3d 1017, 1023 (10th Cir.1996).

Furthermore, the court notes the existence of several unpublished Tenth Circuit opinions, consideration of which requires reversal of the instant decision. In *Callins v. Apfel*, No. 98-6415, 2000 WL 6193 at *3 (10th Cir. Jan. 6, 2000); *Fries v. Chater*, 96-2047, 1997 WL 31561, at *2 (10th Cir. Jan. 28, 1997); and *Turner v. United States Dep't of Health & Human Servs.*, No 94-6202, 1995 WL 339402 at *4 (10th Cir. June 7, 1995), the Tenth Circuit adopted the stance taken by the Eighth Circuit that an I.Q. score of 70-79, inclusive, constitutes a severe impairment that must be taken into consideration in determining what work the claimant can do. *See Cockerham v. Sullivan*, 895 F.2d 494, 496 (8th Cir. 1990) ("[a] claimant whose alleged impairment is an I.Q. of 70-79 inclusive has alleged a severe impairment and may be considered disabled after consideration of vocational factors.").

The case is REVERSED and REMANDED for further consideration of Plaintiff's mental impairments and for analysis of the mental and physical demands of Plaintiff's past work in accordance with SSR 82-62, and for such further development of the record and other proceedings as deemed necessary by the Social Security Administration in light of this Order.

SO ORDERED this 18th Day of February, 2000.

Frank H. McCarthy

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DANNY RAY RABBITT,
SSN: 442-66-7632,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 99-CV-9-M

ENTERED ON DOCKET

DATE FEB 22 2000

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 18th day of Feb., 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DANNY RAY RABBITT, SSN: 442-66-7632, PLAINTIFF, vs. KENNETH S. APFEL, Commissioner of the Social Security Administration, DEFENDANT.	)	CASE NO. 99-CV-9-M

ORDER

Plaintiff, Danny Ray Rabbitt, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

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[1] Plaintiff's March 30, 1994, application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held December 15, 1995. By decision dated December 12, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on November 4, 1998. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born October 2, 1963, and was 32 years old at the time of the hearing.[2] [R. 64, 163]. He claims to have been unable to work due to "an injury to his right side." [Plaintiff's Brief, R. 71, 126].

The ALJ determined that Plaintiff has a severe impairment consisting of right shoulder injury but that he retained the residual functional capacity (RFC) to perform work-related activities except for work requiring frequent, prolonged or repetitive use of the right upper extremity. [R.23]. He determined that Plaintiff cannot perform his past relevant work (PRW) of laborer but found that other jobs exist in the economy which Plaintiff can perform with his RFC and concluded that Plaintiff is not disabled as defined by the Social Security Act. [R. 24]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled.

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[2] Plaintiff testified to a June 2, 1963, birthdate at the hearing, but his application for benefits and the medical records consistently record his birthdate as October 2, 1963.

See Williams v. Bowen, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's determination is based upon an incorrect RFC assessment and that the testimony of the vocational expert (VE) did not identify jobs in the national economy that meet the "significant numbers" criteria. [Plaintiff's Brief]. For the reasons discussed below, the Court affirms the decision of the Commissioner.

Plaintiff's complaint with regard to the ALJ's RFC determination focuses upon an alleged discrepancy between the Physical Residual Functional Capacity Evaluation form filled out by Michael Karathanos, M.D., on April 18, 1996 and the ultimate RFC determination reached by the ALJ. [R. 20, 243-247]. Plaintiff speculates that because Dr. Karathanos's RFC did not include an indication of Plaintiff's lifting ability below 11 pounds, Dr. Karathanos "did not think that Mr. Rabbitt could frequently or continuously lift or carry any amount of weight." [Plaintiff's Brief]. As pointed out in Defendant's brief, however, assessment of a claimant's RFC is an administrative function, not a medical finding. 20 C.F.R. §416.927(f); 20 C.F.R. § 416.925(a); *Castellano v. Secretary of Health and Human Services,* 26 F.3d 1027 (10th Cir. 1994)(a physician's opinion that a claimant is totally disabled is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the [Commissioner]). At any rate, Dr. Karathanos's RFC form contains many blanks and appears to be only partially completed and there is no indication that he believed Plaintiff incapable of lifting any weight below 11 pounds. Furthermore, in his report which accompanied the RFC form, Dr. Karathanos stated that Plaintiff had full range of motion in the right

upper extremity and Plaintiff's ability to use both hands and all fingers for repetitive movement was unlimited. Even if Plaintiff's speculative conclusions were taken as true, Dr. Karathanos's role in this claim was as a consultative examiner for the DDU, and so, his report is not entitled to the controlling weight Plaintiff asserts it should be accorded. It is for the Commissioner to decide what weight to accord various medical reports. *Johnson v. Bowen*, 864 F.2d 340 (5th Cir. 1988).

The ALJ's opinion indicates that he considered all of the medical reports in the record in making his RFC determination including the records of Plaintiff's treating physicians. Objective evidence shows Plaintiff has normal range of motion and strength in his upper extremities. [R. 221-222, 243-244]. X-rays of his right shoulder were negative (normal). [R. 146]. Although Plaintiff's treating physicians recorded complaints of pain in the right shoulder, Plaintiff was denied refills of medication after missing follow-up appointments and was noted to be "noncompliant" with treatment programs. [R. 139-147, 230-234]. The only evidence in the record that Plaintiff's pain is disabling is his testimony. It is well settled that subjective complaints alone are not sufficient to establish disability. *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir. 1993). The inability to work pain-free is not sufficient reason to find a claimant disabled. See *Gossett v. Bowen*, 862 f.2D 8002, 807 (10th Cir. 1988).

The ALJ described the evidence in the record upon which he based his conclusion that Plaintiff could perform work at the sedentary level with light exertional level lifting and carrying with the limitations set forth in his findings. This evidence included all the medical evidence and Plaintiff's testimony that he could drive a truck,

[R. 67], hunt and fish, [R. 68], cut the grass, [R. 70], plant a garden, [R. 70], cut and carry firewood, [R. 71] and lift 10 pounds [R. 77]. As the ALJ noted, Plaintiff's daily activities do not support his testimony of disabling pain. The ALJ was entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The Court finds that the ALJ evaluated the record and Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts. See *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995)(factors to be considered by ALJ in assessing credibility include extensiveness of attempts (medical or nonmedical) to obtain relief and frequency of medical contacts). The ALJ explained his reasons for discounting Plaintiff's pain allegations and appropriately discussed in detail the evidence that led him to believe Plaintiff's condition is not as severe as he alleged. To the extent Plaintiff seeks to challenge the weight the ALJ gave to the evidence, his argument must fail. The Court will not reweigh the evidence. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). The Commissioner, not the courts, has the duty to weigh the evidence, resolve material conflicts in the evidence and decide the case, *Johnson, id.*, (citing *Chaparro v. Bowen*, 815 F.2d 1008 (5th Cir. 1987)). See also *Brown v. Bowen*, 801 F.2d, 361 (10th Cir. 1986) and *Ellison v. Sullivan*, 929 F.2d 534 (10th Cir. 1990).

As to Plaintiff's contention that the ALJ failed to identify a significant number of jobs in the national economy that he could perform with his limitations, the Court also finds no merit. Plaintiff relies on a district court case to bolster his contention that the jobs identified by the VE and relied upon by the ALJ do not constitute a significant number of jobs and that the Commissioner consequently failed to show that Plaintiff is not disabled. See *Jimenez v. Shalala*, 879 F. Supp. 1069, 1076 (D. Colo.1995)(holding that "200-250 jobs spread across Colorado is not significant"). This case is unpersuasive, however, particularly in light of the overall record before this Court. The Tenth Circuit has held that the Commissioner need only show that Plaintiff can perform **one or more** occupations with a significant number of available positions. *Evans v. Chater*, 55 F.3d 530, 532 (10th Cir. 1995). In evaluating what constitutes a "significant number" several factors should be considered: the level of claimant's disability; the reliability of the vocational expert's testimony; the distance claimant is capable of traveling to engage in the assigned work; the isolated nature of the jobs; the types and availability of such work. *Trimiar v. Sullivan*, 966 F.2d 1326, 1330 & n.10 (10th Cir. 1992). The decision should ultimately be left to the ALJ's common sense in weighing the statutory language as applied to a particular claimant's factual situation. *Trimiar,* p. *1330; Jenkins v. Bowen*, 861 F.2d 1083, 1087 (8th Cir. 1988) (quoting *Hall v. Bowen*, 837 F.2d 272, 275 (6th Cir. 1988)). In this case, the VE identified jobs that are available in the economy in the sedentary range with the limitations described by the ALJ of no frequent, prolonged, repetitive or pressure use of the right upper extremity. Those jobs are identified as: assembler, 2,400 in

Oklahoma, 280,000 nationally; cashier, 1,200 in Oklahoma, 360,000 nationally; surveillance monitor, 150 in Oklahoma, 18,000 nationally; and information clerk, 110 in Oklahoma and 15,000 nationally. Even with the assembler jobs eliminated, a significant number of jobs remain in the economy which Plaintiff could perform with his RFC. Therefore, substantial evidence supports the ALJ's conclusion that plaintiff is not disabled.

In light of Plaintiff's testimony as to his daily activities and abilities, and the evidence from the medical record that Plaintiff exhibited normal full range of motion, grip strength and finger dexterity, [R. 135, 143, 222, 243], the decision of the ALJ that Plaintiff could perform sedentary work with light exertional lifting/carrying reduced by his inability to perform tasks requiring frequent, prolonged or repetitive use of the right upper extremity and that significant numbers of jobs exist in the economy which Plaintiff could perform, is supported by substantial evidence.

The record as a whole contains substantial evidence to support the determination that Plaintiff is not disabled within the meaning of the Social Security Act. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 18th day of Feb., 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE